

REVIEW ESSAY

PROTECTING CIVIL RIGHTS: A CRITIQUE OF RAOUL BERGER'S HISTORY

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Every seven years since World War II, we have had not only clouds of locusts but also Great Debates among the Justices of the Supreme Court over the history of the Civil War amendments. The struggle for control of constitutional history surfaced in battles over the incorporation of the Bill of Rights,¹ school desegregation,² liability for violation of civil rights,³ and private racial discrimination in housing.⁴

The cycle was broken in 1975.⁵ With characteristically excellent timing,⁶ however, Raoul Berger brought forth another book at the

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¹ See *Adamson v. California*, 332 U.S. 46, 51-54 (1947); *id.* at 61-67 (Frankfurter, J., concurring); *id.* at 71-75 (Black, J., dissenting).

² See *Brown v. Board of Educ.*, 347 U.S. 483, 489-92 (1954).

³ See *Monroe v. Pape*, 365 U.S. 167, 171-91 (1961); *id.* at 194-201 (Harlan, J., concurring); *id.* at 225-37 (Frankfurter, J., dissenting). Although technically a debate over the reach of 42 U.S.C. § 1983, the majority and dissenting opinions are in fact full-scale analyses—from divergent viewpoints—of Reconstruction and the intended scope of the fourteenth amendment.

⁴ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-44 (1968); *id.* at 444-49 (Douglas, J., concurring); *id.* at 454-76 (Harlan, J., dissenting). In resurrecting 42 U.S.C. § 1982, derived from the Civil Rights Act of 1866, Justice Stewart's majority opinion redefined the reach of the thirteenth amendment. *Id.* at 439. Justice Harlan did battle on this issue in his dissent. *Id.* at 473-76. For the views of a latecomer to the dispute, see *Runyon v. McCrary*, 427 U.S. 160, 189-91 (1976) (Stevens, J., concurring).

⁵ The struggle continued—and continues—in decisions concerning access to the federal courts, which follow *Younger v. Harris*, 401 U.S. 37 (1971), in which Justice Black discovered "the slogan, 'Our Federalism,'" *id.* at 44, and in which the Court failed to consider the relevance of the post-Civil War amendments to its decision, see *id.* at 55 (Stewart, J., concurring). The constitutional debate has continued in attempts to reconcile the significance of this failure with the Court's recognition in *Mitchum v. Foster*, 407 U.S. 225, 238 (1972), of a "basic alteration in our federal system" after the Civil War. The debate also underlay the abrogation of *Mitchum* and *Monroe v. Pape*, 365 U.S. 167 (1961), in *Paul v. Davis*, 424 U.S. 693 (1976). Cf. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978) (reexamination of legislative history compels conclusion that local governments were intended to be included among the "persons" to which § 1983 applies). See generally Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977).

⁶ See R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974); R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973); R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969).

right moment. In *Government by Judiciary*,⁷ Berger offers an extensive history of the fourteenth amendment, affording ammunition to any Justice with a seven-year itch to relitigate the Court's recent historical decisions. Until now, most Justices on the Burger Court seem anxious to appear consistent with at least the form of the precedents that interpret the Reconstruction amendments and civil rights statutes. *Government by Judiciary* hit the law libraries and newsweeklies at a critical juncture, nonetheless. There is a crescendo building toward revision or reversal of the recent interpretation of constitutional alteration in the years following the Civil War.⁸ The potent combination of a distinguished author and the imprimatur of the Harvard University Press—if and when added to Justice Rehnquist's politics—threatens to carry the day, or at least a majority of the Court. The person who controls history may not control the future, but a citation to the history in *Government by Judiciary* may be extremely useful to a vanguard of judges or Justices convinced of the need strictly to construe the Civil War amendments and civil rights statutes.⁹

⁷ R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) [hereinafter cited by page number only].

⁸ See, e.g., *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-57 (1978); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977); *National League of Cities v. Usery*, 426 U.S. 833, 844-45 (1976); *Rizzo v. Goode*, 423 U.S. 362, 373-74 (1976).

Justice Rehnquist appears to be in the forefront in articulating the Court's increasingly restrictive views of the impact of the Civil War amendments. *Flagg Bros.*, *National League of Cities*, and *Rizzo* join other majority opinions written by Rehnquist, such as *Paul v. Davis*, 424 U.S. 693 (1976); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); and *Edelman v. Jordan*, 415 U.S. 651 (1974), as examples of Rehnquist's success in writing his view of post-Civil War enactments into majority opinions. But see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-56 (1976). That Rehnquist himself holds an even narrower view is apparent in a series of his dissents, beginning with his first from the per curiam decision in *Cruz v. Beto*, 405 U.S. 319, 325-26 (1972). Other Rehnquist dissents in this vein include *Trimble v. Gordon*, 430 U.S. 762, 783-86 (1977) (questioning applicability of fourteenth amendment to illegitimates); *Buckley v. Valeo*, 424 U.S. 1, 291 (1976) (contending that "not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment"); and *Sugarman v. Dougall*, 413 U.S. 634, 649-50 (1973) (questioning applicability of the fourteenth amendment to aliens).

Justice Rehnquist has demonstrated his ability to convince a majority of his Brethren to adopt the essence of his erstwhile lonely dissents on similar issues. See, e.g., *Foley v. Connelie*, 435 U.S. 291, 295-96, 299-300 (1978) (adopting much of *Sugarman v. Dougall*, 413 U.S. at 651-52, 661-62 (Rehnquist, J., dissenting)); *National League of Cities v. Usery*, 426 U.S. at 843-45, 854-55 (adopting much of *Fry v. United States*, 421 U.S. 542, 549-59 (1975) (Rehnquist, J., dissenting)).

For Rehnquist's views generally, see Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

⁹ Thus far, *Government by Judiciary* appears to have been cited in three reported federal decisions and three state court decisions. See *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*,

The thesis of the book is that history unequivocally shows that the members of the 39th Congress intended only to protect narrowly defined rights when they passed the Civil Rights Act of 1866 over President Johnson's veto and when they drafted and passed the fourteenth amendment and sent it to the states for ratification. Berger contends that the fourteenth amendment merely constitutionalized the limited coverage of the Civil Rights Act of 1866 and that therefore the amendment was not intended to—and does not properly—reach such issues as suffrage and segregation. In ignoring the clear intent of the amendment's framers, he argues, the Warren Court instituted "‘revolutionary’ changes"¹⁰ and "revised the Fourteenth Amendment to mean exactly the opposite of what its framers designed it to mean."¹¹

I leave to others the debate over Berger's strictly orthodox jurisprudential notions of strict construction; that discussion is well under way.¹² This essay will show that the history of the Civil Rights Act of

584 F.2d 1235, 1254 n.96 (3d Cir. 1978) (en banc) (citing Berger for the proposition that "the weight of legal precedent" in 1871 supported congressional authority to pass legislation governing individuals on the authority of constitutional provisions "addressed to 'laws and regulations' of states"), *rev'd*, 99 S. Ct. 2345 (1979); *Turpin v. Mailet*, 579 F.2d 152, 173 nn.8, 9, 11, 14 & 15 (2d Cir.) (en banc) (Van Graafeiland, J., dissenting) (joined by Mulligan, Timbers & Meskill, JJ.) (dissenters criticize as a judicial usurpation of legislative power the majority's holding that a municipality is liable in damages under 42 U.S.C. § 1983 (1976) and on implicit constitutional grounds for unlawful acts by employees if itself a wrongdoer), *vacated and remanded sub nom. City of West Haven v. Turpin*, 99 S. Ct. 554, 555 (1978), *reinstated in part and remanded*, 591 F.2d 426, 427 (2d Cir. 1979); *NLRB v. Houston Distrib. Servs., Inc.*, 573 F.2d 260, 266 n.5 (5th Cir.) (citing Berger for proposition that fourteenth amendment's prohibition against determining testimonial competency on the basis of race applies to the NLRB through the fifth amendment), *cert. denied*, 99 S. Ct. 722 (1978); *People v. Pettingill*, 21 Cal. 3d 231, 254, 578 P.2d 108, 122, 145 Cal. Rptr. 861, 875 (1978) (en banc) (Clark, J., dissenting) (reliance on state constitution to avoid United States Supreme Court's more restrictive interpretation of criminal defendant's *Miranda* rights criticized by quoting Berger's statement, p. 306, that "[a] common historical fallacy is to import our twentieth-century conceptions into the minds of the Founders'"); *Whorton v. Commonwealth*, 570 S.W.2d 627, 633 n.3 (Ky. 1978) (Lukowsky, J., concurring) (citing Berger for proposition that historical rationale for applying the first, fourth, sixth, and eighth amendments to the states through the fourteenth amendment has been "undermined"); *Nebraska State Bank v. Dudley*, 278 N.W.2d 334, 337 (Neb. 1979) (citing Berger for proposition that "[t]he original particular design of the privileges and immunities clause was to preserve those rights established by the Civil Rights Act and prohibit the states from violating such rights"). No doubt there will soon be many other citations. The most entertaining is likely to remain Judge Oakes' somewhat cryptic statement that "Rostow, *The Democratic Character of Judicial Review*, 66 Harv.L.Rev. 193 (1952), is about as far removed from R. Berger, *Government by Judiciary* (1977), as Ralph Waldo Emerson is from Franz Kafka." *Turpin v. Mailet*, 579 F.2d at 169 n.3 (Oakes, J., concurring).

¹⁰ P. 283.

¹¹ P. 245.

¹² See, e.g., Alfange, Book Review, 5 HAST. CONST. L.Q. 603, 608-28 (1978); Kay, Book Review, 10 CONN. L. REV. 801, 803-10 (1978); Knowlton, Book Review, 32 ARK. L. REV. 157, 158-67 (1978), and Berger, Reply, 32 ARK. L. REV. 280, 281-92 (1978); Murphy, Book Review,

1866 and of the fourteenth amendment is a good deal more complex than Berger believes. Unfortunately, *Government by Judiciary* contains very poor history. Berger abuses the very quotations from the *Congressional Globe* that he finds determinative. He fails to notice the political and intellectual worlds in which the legislators spoke. And he offers serious misinterpretation of the recent work of leading historians upon which he relies. He is entirely unwilling to acknowledge the importance of context and the complexity of discerning historical meaning. Berger's fervor for strict construction has serious costs when he attempts to "do" history. Nuance and change are ignored; snatches of language are quoted out of context; no attempt is made to explain the historical moment. Berger lacks a diachronic sense of historical development. He cannot accept multiple causation or contextual explanation. He is entirely without a good historian's sense of irony.

In fairness, Berger is not a historian. He proclaims himself "[a] lawyer not committed to the revisionist or any other school . . . who holds no brief for 'lawyer's history.'" ¹³ Yet he proclaims his task to be "that of an historian, to attempt accurately and faithfully to assemble the facts." ¹⁴ What Berger believes to be "undiluted realism," ¹⁵ however, proves to be the worst type of law office history. It is not pleasant to emphasize how badly Berger misuses historical materials. There is charm to his curmudgeonly style. He affords an appealing vision of the scholar as lone wolf, whose acknowledgments decline to list helpful "[e]minent historians, social scientists, and lawyers . . . in order to spare them the embarrassment of being associated with my views." ¹⁶ At first glance, it is refreshing to discover a footnote that admits that the source of the quoted statement cannot be located, and that therefore "[t]he reader may give it such credence as it deserves." ¹⁷ It is also valuable to be called back to the original sources.

87 YALE L.J. 1752, 1754-71 (1978); Nathanson, Book Review, 56 TEX. L. REV. 579, 581-85 (1978); Perry, Book Review, 78 COLUM. L. REV. 685, 691-97 (1978).

¹³ P. 243.

¹⁴ P. 5.

¹⁵ P. 243.

¹⁶ P. vii.

¹⁷ P. 124 n.32. This statement is in the footnote to a quotation attributed to Senator Henry Wilson, a Radical Republican from Massachusetts. It follows Mr. Berger's assurance, "I copied Wilson's statement from the debates but have lost the citation and have been unable to locate it in the circa 4500 three-column pages." *Id.* The quotation was actually the statement of Representative James F. Wilson of Iowa, Chairman of the House Judiciary Committee. See CONG. GLOBE, 39th Cong., 1st Sess. 173 (1866). Perhaps Berger was misled by the same misattribution in P. PALUDAN, A COVENANT WITH DEATH 50 (1975). But the point is not Berger's inability to locate a single footnote in his massive work. Rather, it is Berger's apparent incapacity to understand the thrust of Wilson's remarks because they do not fit his theory. See note 20 *infra*.

This essay discusses those sources. The problem is more serious than the constant intrusion of Berger's jurisprudence, in which he perceives himself to be the medium, and not a mere intermediate, for the Bingham and Trumbulls of the 39th Congress. I do not focus on Berger's assumption that history involves binary choices—that strict analogy to an adversarial system will afford historical “proof positive”¹⁸—nor shall I dwell on his belief that the basic function of the historian is to locate imperative categoricals. My foremost concern is with the “evidence” Berger adduces.¹⁹ Even when simply quoting the *Congressional Globe*, Berger becomes so ensnared in his own polemics that the history he offers—he would not accept the notion that it is an interpretation of history—is misleading and frequently internally inconsistent in the most crucial areas.²⁰

¹⁸ Berger constantly invokes the rules of evidence; he considers the courtroom method of testing reliability or ascertaining truth directly transferable to historical materials. *See, e.g.*, pp. 6, 144, 207. For example, he has faith in the reliability of legislative debates as the almost exclusive source for the thought of the era because “[w]hat men say while they are acting are themselves facts, as distinguished from opinions about facts.” P. 6.

¹⁹ *See* p. 7.

²⁰ A good example is the misattributed quotation, *see* text accompanying note 17 *supra*. Berger says that Senator Wilson, who introduced a bill to provide suffrage—for black and white alike—in the District of Columbia, fully appreciated the difference between congressional authority over the District and over the states. Because Wilson “lamented that in ‘dealing with the States,’ State ‘constitutions block up the way and we may not overleap the barriers,’” Berger is certain that he recognized the inviolability of state sovereignty, “which the framers were zealous to preserve.” P. 124.

But Representative Wilson's point was quite different. Certainly his remarks were not a paean to state sovereignty. His theme was that state constitutions and state laws had in the past blocked “the broad, bright surface of the real Constitution.” *CONG. GLOBE*, 39th Cong., 1st Sess. 173 (1866). The “real Constitution” defined a political structure that “in no way develops color of skin as a tenure to the rights and privileges of citizenship.” *Id.* Wilson followed his “lament,” which Berger quotes, with the assertion, which Berger does not quote, that “the great truth . . . in the heart of the old declaration, that ‘all men are created equal’ and that ‘Governments derive their just powers from the consent of the governed’ ” required black suffrage in the District as a model for the states “to aid in hastening the development of a perfect Republic.” *Id.*

In fact, Representative Wilson's speech here, and his words in opposition to the famous Bingham “deletion,” *id.* at 1294-95, *see* text accompanying notes 169-73 *infra*, were paradigmatic statements of the optimistic political theory of the congressional leadership. Wilson offered an emotional reminder of the contributions of blacks to the war effort, derided states' rights, and emphasized the duty of the federal government to protect the rights recognized in the Declaration of Independence. *See CONG. GLOBE*, 39th Cong., 1st Sess. 1294 (1866). To him, as to many of his colleagues, states' rights were “glittering generalities,” *id.*, which had long supported slavery and had caused the Civil War. Wilson and other men of the 39th Congress self-consciously sought to narrow the gap between the old state sovereignty barriers and the “real Constitution,” the “perfect Republic.”

It is thus strange to find Representative James Wilson—or Senator Henry Wilson, for that matter—referred to as “zealous to preserve state sovereignty.” Senator Wilson, the “Natick

The basic thesis in Raoul Berger's view of historical truth may be summarized briefly. First, from 1787 onward, Berger claims, Americans have been committed to positivism rather than natural law.²¹ Both before and immediately after the Civil War, the North was Negrophobic and anti-abolitionist.²² Therefore, no one could have intended to extend much protection to the newly emancipated slaves. Second, the 39th Congress did pass the Civil Rights Act of 1866,²³ but the Act had very limited objectives and was painstakingly confined to plainly expressed fundamental rights.²⁴ The fourteenth amendment, passed by the same Congress, constitutionalized that narrow statutory protection, but did not go beyond it:²⁵ the men of the 39th Congress did not intend broader goals because of their firm belief in state sovereignty.²⁶

Government by Judiciary suffers from a curious dissonance. Berger is aware that "men and votes, not the impalpable 'consensus of society' picked up by judicial antennae, are what count."²⁷ But he is possessed of a myopic faith that men and votes may be understood by an exclusive focus on what is said in the halls of Congress. Berger concedes that he will concentrate only upon the legislative intent as it is disclosed in the official record.²⁸ To him, this is "a stenographic

Cobbler," embraced the label "radical" and celebrated the opportunity of the 39th Congress to change the *status quo* radically:

The men who promulgated the Declaration of Independence . . . made themselves somebodies . . . by being radicals. The men who made the Constitution were those same radicals who had carried us through the fire and blood of the Revolution and founded a nation. [They] were radical enough to provide that the men of other generations could amend the work of their hands; and we, like our radical fathers, accept the living truths of the present, and we incorporate into the fundamental law of the land what is necessary to make the country what its founders intended it should be . . .

Id. at 114. Senator Wilson believed federal power "full, ample, [and] complete" to ensure the protection of "just and equal laws" to all men newly freed by the Constitution. *Id.* at 111. That the theme sounded by the two Wilsons was not atypical, and that it cannot be reconciled with Mr. Berger's entire historical interpretation, will become increasingly apparent below.

²¹ Pp. 250-54, 388.

²² Pp. 10-16.

²³ Ch. 31, 14 Stat. 27 (1866) (current versions at 42 U.S.C. §§ 1981, 1982 (1976), 18 U.S.C. § 242 (1976)).

²⁴ Pp. 22-36, 108, 116.

²⁵ Pp. 99-116.

²⁶ Pp. 16-18.

²⁷ P. 129.

²⁸ P. 6. Berger ignores the supplemental House and Senate Journals and relies exclusively on the *Congressional Globe*, though its "limitations are well known to scholars." H. BELZ, *RECONSTRUCTING THE UNION* 314 (1969). Berger also does not consider the possibility that retrospective editorial control might have altered the transcript, as it frequently does the *Congressional Record* today. See Steiger, *Read Any Fiction Lately?*, N.Y. Times, Aug. 29, 1977, at 27, col. 1; *The Record: Stirring Speeches in Absentia*, 33 CONG. Q. WEEKLY REP. 527 (1975).

transcription . . . comparable to a news film of an event at the moment it was taking place and free from the possible distortion of accounts drawn from recollection or hearsay.”²⁹ Berger has faith that the framers of the fourteenth amendment left a “transcript of their minds”³⁰ that he is capable of reading. Unfortunately, Berger believes only what he sees, and sees only what he believes. That there were major changes in political thought and legal theory during and after the Civil War is unacceptable to Berger.

Several “sins of commission” undermine the accuracy of Berger’s assemblage and interpretation of statements made during the 39th Congress. Berger first misapprehends the legal thought of the period. He stumbles most obviously in his unwillingness to concede the influence of natural law theory and antislavery thought on the Republicans of the 39th Congress. He is so committed to his own static view of the Constitution that he also grossly misinterprets, at the critical point in his argument, the important recent work of Professors Robert Cover and Morton Horwitz.

Berger also ignores the myriad statements, in the very *Congressional Globe* on which he relies, that directly contradict his single-minded theory. He quotes so selectively, and is such a master of the use of ellipses, that it is tedious to begin to demonstrate, quotation by quotation, that the balance of congressional statement and action tips heavily against the case he asserts. Fortunately for the reader, however, even the carefully selected quotations Berger chooses to present contain the seeds of a counterinterpretation—if not the destruction—of the meaning he would have us glean from those very quotations.

Additionally, Berger wholly ignores the profound effects of important political events of the period. These include several blunders by President Andrew Johnson during the spring of 1866, when the Civil Rights Act was passed over his veto. The President drove many moderate Republicans into the waiting arms of the Radical wing of the dominant Republican Party, and split permanently with Congress. Finally, Berger fails to recognize that the Civil War altered the common perception of governmental relationships.

This essay will not dispute Berger’s assertion that the fourteenth amendment simply constitutionalized the guarantee of civil rights contained in the Civil Rights Act of 1866. There is good reason to believe that the fourteenth amendment was intended to do more, but

²⁹ P. 6.

³⁰ P. 372.

that complex issue is beyond the scope of my review. Assuming for the sake of argument that the fourteenth amendment merely constitutionalized the statutory rights guaranteed by the Civil Rights Act of 1866, Berger is simply wrong about how broad those rights were. Although it is much more difficult than Berger concedes to discern the thought of a conglomeration of congressmen more than a century ago, clearly some understanding of the impact of natural law and the theory of the antislavery movement is basic to comprehension of the rights that antislavery veterans, who controlled Congress, hoped to secure in 1866.

The First Session of the 39th Congress convened in December 1865 at a time of great uncertainty. The ratification of the thirteenth amendment that same month, coupled with troubled awareness of the postwar reality, compelled congressmen and the nation to confront the practical problem of how to deal with the newly freed slaves and the vanquished, bitter South.³¹ There had been vast changes in notions about the appropriate role for the federal government, and there was a related and obvious reduction in enthusiasm for state sovereignty in the wake of secession.³² Basic issues of federalism and definition of civil rights demanded consideration in new ways. Congress sought to protect blacks and their white allies³³ against the hostility

³¹ President Johnson's policy was at best ambiguous. By December 1865, Johnson was ready to declare that Reconstruction had been completed and that the Southern states were ready to be restored to the Union. But events in the South undercut his position. Further, Johnson was clearly telling different things to different people. His Annual Message to the new 39th Congress, prepared by the historian George Bancroft, was "brilliant in its ambiguity." M. BENEDICT, *A COMPROMISE OF PRINCIPLE* 132 (1974). See generally *id.* at 117-61; K. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877*, at 50-118 (1965).

³² See generally H. BELZ, *A NEW BIRTH OF FREEDOM* (1976) [hereinafter H. BELZ, *NEW BIRTH*]; H. BELZ, *supra* note 28; J. FRANKLIN, *THE EMANCIPATION PROCLAMATION* (1963); G. FREDRICKSON, *THE INNER CIVIL WAR* (1965); P. PALUDAN, *supra* note 17.

³³ While he slides over the point, Berger is probably correct in arguing that the Civil Rights Act of 1866 was intended to protect the rights of whites and others as well as the rights of blacks. It is, however, a point not without difficulty, particularly in light of the actual text of § 1 of the Act, which stated the degree of protection—for all the rights Berger considers narrowly defined—by reference to "the same right . . . as is enjoyed by white citizens." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981, 1982 (1976)). For Berger, the issue is settled in a footnote reference to a statement by Senator Lyman Trumbull. P. 47 n.40. Senator Trumbull said more than once that the Act "applies to white men as well as to black men. It declares that all persons . . . shall be entitled to the same civil rights." *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866)). But Trumbull's statement alone does not prove, as Berger suggests, that any other reading excluding protection of whites "runs counter to the history of the Civil Rights Bill." *Id.*

I think Berger is correct in asserting that most members of the 39th Congress believed the thirteenth amendment empowered them to reach out to protect others—including whites—in

evident both in the Black Codes adopted in the South and in mob rule, to which witness after witness testified before the Joint Committee on Reconstruction.³⁴

Section I of this essay briefly assesses the natural law background which influenced the actions of the 39th Congress. Section II evaluates Berger's quotations from the *Congressional Globe* transcript; and section III introduces the political context of the late winter and early spring of 1865-1866, to explain the passage of the Civil Rights Act of 1866 over President Johnson's veto. Section IV of this essay suggests a common adherence to a paternalistic notion of protection. Not surprisingly, the statutes and constitutional amendments of the post-Civil War era reflect a sense of new responsibilities: it is an American tradition to reconstitute while seeking to reconstruct. But an understanding of those statutes and amendments must begin with an examination of the old natural law theory in light of which the postwar legislation was drafted.

I

NATURAL LAW, LIMITED OBJECTIVES, AND THE 39TH CONGRESS

Berger asserts away the influence of abolitionist thought on the 39th Congress.³⁵ He appears to base his position on three premises:

addition to blacks. My interpretation of statements by Trumbull and other politicians, and of early decisions construing both the thirteenth and fourteenth amendments, is that the Civil War amendments were generally perceived as guaranteeing "universal freedom" from any racially motivated discrimination in basic civil rights. Race could not be the basis for discriminatory treatment; the mainstream approach was a sort of *mens rea* test that would include discrimination by other majorities against whites. See CONG. GLOBE, 39th Cong., 1st Sess. 1293-94 (1866) (remarks of Rep. Shellabarger); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880); *Kentucky v. Powers*, 201 U.S. 1, 32-33 (1906); *United States v. Wong Kim Ark*, 169 U.S. 649, 676, 693 (1898); *Ex parte Virginia*, 100 U.S. 339, 363 (1880) (Field, J., dissenting). For a particularly good discussion, see *United States v. Cruikshank*, 25 F. Cas. 707, 712 (C.C.D. La. 1874) (No. 14,897) (Bradley, Circuit Justice).

The point here, however, is that even when he is right in his reading of history, Berger is reductionist in the extreme. One debating point, even by Senator Trumbull, the bill's sponsor, does not so readily "the history of the Civil Rights Bill" make.

³⁴ A special Joint Committee on Reconstruction, composed of nine representatives and six senators, through which all Reconstruction matters would be funnelled, was established as the 39th Congress convened. Its membership was carefully brokered. See M. BENEDICT, *supra* note 31, at 140-45; W. BROCK, *AN AMERICAN CRISIS* 96-100 (1963); L. COX & J. COX, *POLITICS, PRINCIPLE AND PREJUDICE* 142-43 (1963); E. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 258-60 (1960). For a brief essay on the Joint Committee and for selections from the evidence it heard, see *BACKGROUND FOR RADICAL RECONSTRUCTION* (H. Trefousse ed. 1970).

³⁵ P. 14.

judges generally had upheld laws requiring the return of fugitive slaves;³⁶ during the thirty years prior to 1866, abolitionists were despised in a North that was Negrophobic;³⁷ and concepts of state sovereignty remained constant.³⁸ From these assertions, Berger derives the central point in his argument that natural law had little impact in 1866,³⁹ and that the Civil Rights Act of 1866 was strictly limited to narrowly defined rights.⁴⁰

In reaching his conclusion, Berger errs in failing to distinguish among abolitionists and between abolitionists and other antislavery advocates. Moreover, he pays little attention to the history of the antislavery advocates and the historiography about them.⁴¹ Indeed, he appears unaware that the fortunes of the antislavery activists ebbed and flowed. For points basic to his history and his theory, Berger relies heavily on the subtle and important work of Robert Cover in *Justice Accused*⁴² and of Morton Horwitz in *The Transformation of American Law*,⁴³ but Berger's reading of these two books reflects either a misunderstanding of, or the willing suspension of belief in, what is clearly on the page. He chops out quotations to construct his own reusable past, and he ignores fundamental themes in each book that directly contradict his interpretation. The way in which Berger misreads or misuses these recent secondary works should serve as a warning for his reading of the older and murkier primary sources.

Berger also ignores the rather considerable changes in legal thought between the Constitution of 1787-1791, and the "Second Constitution" adopted in the Civil War amendments. He simply overlooks the way in which Professors Cover and Horwitz painstakingly

³⁶ E.g., pp. 226, 254.

³⁷ E.g., pp. 10-16, 233-36.

³⁸ E.g., pp. 17-18, 154-55, 242.

³⁹ Pp. 250-54.

⁴⁰ P. 239.

⁴¹ Berger wholly ignores, for example, the extensive historiography concerning the internecine warfare among the abolitionists and the broadening and politicization of abolitionist ideas through the Republican party in the 1850's. Particularly useful recent scholarly work includes D. DAVIS, *THE SLAVE POWER CONSPIRACY AND THE PARANOID STYLE* (1969); D. DUMOND, *ANTISLAVERY* (1961); L. FILLER, *THE CRUSADE AGAINST SLAVERY* (1960); E. FONER, *FREE SOIL, FREE LABOR, FREE MEN* (1970); G. FREDRICKSON, *supra* note 32; A. KRADITOR, *MEANS AND ENDS IN AMERICAN ABOLITIONISM* (1969); J. MCPHERSON, *THE STRUGGLE FOR EQUALITY* (1964); R. SEWELL, *BALLOTS FOR FREEDOM* (1976); R. WALTERS, *THE ANTISLAVERY APPEAL* (1976); W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977). A useful introductory synthesis is M. DILLON, *THE ABOLITIONISTS* (1974). *See generally* *THE ANTISLAVERY VANGUARD* (M. Duberman ed. 1965).

⁴² R. COVER, *JUSTICE ACCUSED* (1975); *see* pp. 252 & n.15, 254 n.26, 388, 390.

⁴³ M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1977); *see* p. 321 & n.33a.

trace fundamental ambivalence in,⁴⁴ and evolution of,⁴⁵ American legal thinking in the pre-Civil War period. Also, Berger appears unaware of rapid change in legal thinking and congressional and executive activity during the Civil War.⁴⁶

Berger is so pure a positivist in his devotion to a fixed constitutional meaning that he betrays no understanding of the continuing influence of natural law, acknowledged and discussed by Cover,⁴⁷ or of the evolution and dominance of instrumentalism, which Horwitz convincingly documents.⁴⁸ For Berger, Justice Samuel Chase's reliance on natural law in 1798 in *Calder v. Bull*⁴⁹ "departed from the Founders' commitment to written limits on all power."⁵⁰ Therefore, any reference to the natural rights of the Declaration of Independence to aid in understanding the Constitution is, to Berger, "[m]anifestly . . . out of tune with the historical facts."⁵¹

⁴⁴ See, e.g., R. COVER, *supra* note 42, at 8-9, 28-30, 226; M. HORWITZ, *supra* note 43, at 30, 254-56.

⁴⁵ See, e.g., R. COVER, *supra* note 42, at 9-28, 79-82, 93-99; M. HORWITZ, *supra* note 43, at 1-30, 253-66.

⁴⁶ For a particularly clear account of the alteration in war aims and reconstruction policies during the Civil War, see H. BELZ, *NEW BIRTH*, *supra* note 32. See generally H. TREFOUSSE, *THE RADICAL REPUBLICANS* 203-304 (1968).

⁴⁷ See R. COVER, *supra* note 42, at 21-22, 33, 93-99; text accompanying notes 52-64 *infra*.

⁴⁸ See M. HORWITZ, *supra* note 43, at 1-30.

⁴⁹ 3 U.S. (3 Dall.) 386, 388 (1798).

⁵⁰ P. 252.

⁵¹ P. 88. The "historical facts" Berger invokes to dismiss any influence of the Declaration of Independence are simply his assertion that "[t]o import the Declaration into the Constitution is to overlook their totally different provenance," and his adoption of a simplistic Beardian notion that "[t]he Declaration was a product of rebels and revolutionaries" and the Constitution "in no small part [was] a recoil from the 'excesses' of popularly controlled legislatures." P. 87.

Recognition of general reliance on the Declaration of Independence across the spectrum in the antislavery movement abounds, however. See, e.g., *THE ANTISLAVERY ARGUMENT* 70, 216-17, 232-33 (W. Pease & J. Pease eds. 1965); A. KRADITOR, *supra* note 41, at 41, 190-92, 198, 201; R.B. NYE, *WILLIAM LLOYD GARRISON AND THE HUMANITARIAN REFORMERS* 40-45 (1955). If, for example, there was one central, consistent theme in Charles Sumner's career, it was devotion to the principles of the Declaration. See, e.g., Sumner's Eulogy of Lincoln Delivered in Boston (June 1, 1865), reprinted as C. SUMNER, *Promises of the Declaration of Independence*, in 7 *COMPLETE WORKS* 235 (1969); Letter from Charles Sumner to the Mayor of Boston (July 4, 1865), reprinted as C. SUMNER, *Ideas of the Declaration of Independence*, in 7 *COMPLETE WORKS*, *supra*, at 297. See generally D. DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* 208, 449, 532-39 (1970) [hereinafter D. DONALD, *RIGHTS OF MAN*]; M. STOREY, *CHARLES SUMNER* 44, 58-59, 432 (1900).

Berger overlooks the remarkably frequent reference to the Declaration of Independence in the debates in the 39th Congress. He ignores the basic fact that even those whom he designates as Moderate-Conservatives, such as Trumbull and James Wilson, constantly invoked God and the fundamental rights in the Declaration of Independence, see, e.g., *CONG. GLOBE*, 39th Cong., 1st Sess. 322, 474 (1866) (remarks of Sen. Trumbull); *id.* at 1294 (remarks of Rep. Wilson), as they set about altering the "provenance" of the Constitution.

Berger's misapprehensions of the philosophical and jurisprudential universe of the era are numerous. I will survey some of the more obvious errors in Berger's interpretation of these antecedents, beginning with his misuse of Cover's work.

A. Professor Cover and the Judicial Dilemma

Berger supports his assertion that natural law had little if any influence on the legislators of the 39th Congress chiefly by reference to Professor Cover's discussion of judges who faced a crisis of conscience in fugitive slave cases. Yet he misrepresents one of Cover's central points. Cover says that "[t]he notion that out beyond lay a higher law to which the judge qua judge was responsible was never a part of the mainstream of American jurisprudence."⁵² Berger's quotation divides the sentence and omits the italicized portion,⁵³ which is of critical importance. If a book as sophisticated and original as Professor Cover's may be said to have one central theme, that theme is contained precisely in the part of the sentence Berger omits. Cover focuses upon the moral dilemma facing judges such as Joseph Story and Lemuel Shaw because of the clash between their personal belief, based on natural law, that slavery was unjust and their judicial role, by which they were committed to upholding what they took to be the clear constitutional command to return fugitive slaves.⁵⁴

Cover's key point is that *judges* thought themselves bound to follow law they despised in a way in which others were not. Cover summarizes the impact of natural law as follows:

Throughout the sixty year period following the Revolution, most judges and lawyers would have conceded the sense and validity of the pair of statements: (1) natural law has a place in our legal system; and (2) slavery is no creature of natural law, but of municipal law in conflict with natural law.⁵⁵

⁵² R. COVER, *supra* note 42, at 29 (emphasis added).

⁵³ See p. 252 & n.15.

⁵⁴ See R. COVER, *supra* note 42, at 238-43, 249-52. For Story's excoriation of the slave trade, based upon natural law, see *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 845-47 (C.C.D. Mass. 1822) (No. 15,551). See generally 1 W.W. STORY, *LIFE AND LETTERS OF JOSEPH STORY* 335-69 (Boston 1851). For Shaw's belief in the mutability of the common law, and its basis in "natural justice," see *Norway Plains Co. v. Boston & Maine R.R.*, 67 Mass. (1 Gray) 263, 267 (1854). See generally L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 59-108 (1957); Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 525-47 (1974). For examples of reliance on natural law by American judges before the Civil War, see B. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 288-98 (1931).

⁵⁵ R. COVER, *supra* note 42, at 34.

Cover argues that when jurists of this period wished to refer to what is right and just, "[m]ost . . . felt comfortable designating this tradition as 'natural law' and finding it in books and maxims that were self-styled statements of the law of nature."⁵⁶ Indeed, "[t]he very persistence of the language of natural law . . . had the effect of publicly proclaiming the gap between law as it was and law as it should have been."⁵⁷ Berger, however, is capable of summarizing Cover in conclusory fashion: "Robert Cover concluded . . . that the Founders were attached to positive rather than to natural law."⁵⁸ This extreme reductionism typifies Berger's approach to his sources. He simply wills away natural law as a source, and he incorrectly uses Cover for protective coloration. To both sides in the slavery controversy, as Benjamin Wright noted, "natural law was of great importance. . . . [I]t was the principal theoretical weapon."⁵⁹

Natural law was vital even to those who were not abolitionists. It was no accident that "Old Man Eloquent," John Quincy Adams, and his co-counsel, Roger Sherman Baldwin, dramatically invoked the natural rights contained in the Declaration of Independence when arguing for the freedom of the *Amistad* slave mutineers before the Supreme Court.⁶⁰ Any survey of early state constitutions or of the

⁵⁶ *Id.*

⁵⁷ *Id.* at 35.

⁵⁸ P. 388.

⁵⁹ B. WRIGHT, *supra* note 54, at 330; *see id.* at 210-41. *See generally* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

⁶⁰ *United States v. Amistad*, 40 U.S. (15 Pet.) 518, 552, 555 (1841) (arguments of counsel); J.Q. ADAMS, ARGUMENT OF JOHN QUINCY ADAMS 1, 9 (New York 1841); *see* R. COVER, *supra* note 42, at 111-12. Baldwin asked: "Did the people of the United States, whose government is based on the great principles of the revolution, proclaimed in the Declaration of Independence, confer upon the federal, executive or judicial tribunals, the power of making our nation accessories to such atrocious violations of human rights?" 40 U.S. (15 Pet.) at 552. Baldwin and Adams returned repeatedly to the Declaration for their successful argument that the slaves' rights "be determined by that law which is of universal obligation—the law of nature," *id.* at 560. *See id.* at 549, 553, 556, 557.

Legal historians, with the notable exception of Cover, *see* R. COVER, *supra*, at 109-16, generally have ignored the *Amistad* case, which involved complicated claims and cross-claims by the commander of the brig who discovered the ship, the Spanish government, the original slaveholders, and others for the ship, its treasure and the slaves, *see* 40 U.S. (15 Pet.) at 587-90. A fascinating recent history, C. MARTIN, *THE AMISTAD AFFAIR* 183-202 (1970), provides a dramatic recounting of John Quincy Adams' appeal to higher law and his dramatic gesture toward a copy of the Declaration hanging in the courtroom, saying, "I know of no other law that reaches the case of my clients, but the law of Nature and of Nature's God on which our fathers placed our own national existence." *Id.* at 195 (quoting J.Q. ADAMS, *supra*, at 9). Professor John R. Noonan, Jr. argues forcefully, however, that Adams once took quite a different position regarding the rights of slaves brought into United States ports when he thought it necessary to his conduct of foreign affairs as Secretary of State in President Monroe's cabinet. *See* J. NOONAN, *THE ANTELOPE* 71 (1977).

central ideology of the Republican Party reveals that it was not a mere radical fringe of isolated abolitionists who believed in inalienable rights.⁶¹

A key point to Cover's discussion of the relationship of positive law to natural law is that Americans were able to believe in both. Natural law filled gaps left by positive law. In the tradition of Lord Mansfield's influential decision to free a slave in *Somerset's Case*,⁶² natural law might not supersede positive law when positive law dealt with a subject specifically. But natural law provided the standard, the brooding omnipresence, against which positive law should always be measured and which all law should seek to approach. The question of the potency of the natural law standard was critical to the sharp split among abolitionists. It divided the radical abstentionists, led by William Lloyd Garrison and Wendell Phillips, from the Western

The *Amistad* affair became a national *cause célèbre*, helped defeat President Van Buren in 1840, see C. MARTIN, *supra*, at 167-78, and was an important early organizing focus for the American Anti-Slavery Society, see *id.* at 107. Compensation to the Spanish remained a bitter political issue until the Civil War, since it involved indirect federal recognition of slavery. See *id.* at 216-25.

Adams' lonely and sustained opposition to the Gag Rule as a congressman already had made him a hero in the antislavery cause. See L. FILLER, *supra* note 41, at 100-07. The Gag Rule, coupled with the murder of Elijah Lovejoy in Alton, Illinois in 1837 and mob violence directed against abolitionist speakers and presses, did much to gain support for the movement, and whites saw it as a battle for their own civil liberties against the autocratic Slave Power. See M. DILLON, *supra* note 41, at 48-107.

⁶¹ See R. COVER, *supra* note 42, at 43. A. CRAVEN, RECONSTRUCTION: THE ENDING OF THE CIVIL WAR 96 (1969), credits the Republican Party with bringing the Declaration of Independence "back into American life." Abraham Lincoln, a Moderate Republican, constantly relied on the Declaration. See, e.g., First Debate with Stephen A. Douglas at Ottawa, Illinois (Aug. 21, 1858), reprinted in 3 A. LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 1, 16 (1953); Speech at Springfield, Illinois (July 17, 1858), reprinted in 2 A. LINCOLN, *supra*, at 504, 519-20; Speech at Springfield, Illinois (June 26, 1857), reprinted in 2 A. LINCOLN, *supra*, at 398, 403-07. See generally R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 100-02 (1948); K. STAMPP, *supra* note 31, at 34.

⁶² *Somerset v. Stewart*, Lofft 1, 19, 98 Eng. Rep. 499, 510 (K.B. 1772), is the most commonly cited report of the decision by Lord Mansfield discharging a black by a writ of habeas corpus, though he was alleged to be a slave. William Wiecek demonstrates how "*Somerset* burst the confines of its author's judgment" and "took on a life of its own." W. WIECEK, *supra* note 41, at 33-35.

R. COVER, *supra* note 42, at 15, discusses how the congruence of natural law and common law in Blackstone combined to publicize Montesquieu's objections to slavery, and how Blackstone came to assert that "it is repugnant to reason, and the principles of natural law, that such a state [slavery] should subsist anywhere." 1 W. BLACKSTONE, COMMENTARIES *423. To Blackstone, as to Lord Mansfield, "a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman." *Id.* at *127. Berger altogether misses the natural law flavor of Blackstone's objections to slavery, as well as the resonance of the phrase concerning protection of the laws. See text accompanying notes 134-48 *infra*.

abolitionists, such as James G. Birney and Salmon P. Chase,⁶³ who favored working from within the political system and who succeeded through the Republican Party.⁶⁴ Berger does not seem to know much about, or care to bother with, the divisions and disagreements in the antislavery movement.

B. The Antislavery Movement

Wendell Phillips was the most eloquent spokesman for the Garrisonian position that, precisely because judges were bound by positive law which allowed slavery, and lawyers were bound by their oaths, it was morally imperative for opponents of slavery not to cooperate in any way with a Constitution which was a "covenant with death" and an "agreement with hell."⁶⁵

In a sentence which is both imprecise and incorrect, Berger states that Phillips and Garrison "overshadowed" the Western abolitionist theorists.⁶⁶ Therefore, Berger believes, he can dismiss the arguments of legal historians with whom he disagrees, like Jacobus tenBroek and Howard Jay Graham, who emphasized the thought of such leaders as Birney and Chase. He claims that "the natural law of Graham's theologians held no charms" for Garrison and Phillips.⁶⁷ Berger has his history exactly backwards. The Garrison-Phillips wing relied almost exclusively on natural law, and therefore condemned the Constitution as a proslavery document, inconsistent with natural law and therefore not to be followed.⁶⁸ The Westerners, led by Chase and Birney, were not such purists. They were willing to work from within and to become involved in politics; it was their constitutional theory, and political organizing, that produced the

⁶³ See W. WIECEK, *supra* note 41, at 188-91, 211-12, 240-48, 259-75. See generally E. FONER, *supra* note 41, at 74-77, 80, 85-86.

⁶⁴ See R. SEWELL, *supra* note 41, at 285-88, 339-42.

⁶⁵ Garrison took the line from Isaiah 12:18. Phillips popularized the abstentionists' constitutional point, particularly in his famous *Can Abolitionists Vote or Take Office Under the United States Constitution?* (1845) and *The Constitution: A Pro-Slavery Compact* (1856). For an attack on more moderate antislavery constitutional arguments, see Phillips' devastating *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery* (1847).

⁶⁶ P. 230.

⁶⁷ *Id.*

⁶⁸ See W. WIECEK, *supra* note 41, at 228-42. It is not merely recent revisionist historians who have made this point. Three decades ago, as mainstream a historian as Richard Hofstadter wrote: "The secular philosophy of the abolitionists, in so far as they had one, was taken from the Declaration of Independence. They wanted natural rights for the colored man." R. HOFSTADTER, *supra* note 61, at 145; see C. BECKER, *THE DECLARATION OF INDEPENDENCE* 242-51 (1922); D. DUMOND, *supra* note 41, at 67-82.

mainstream of Republican Party thought. But they joined Garrison and Phillips in their heavy reliance on the Declaration of Independence. They reconciled it with their constitutional views. Eric Foner offers an excellent description of the crucial role played by Chase, for example, during the late 1840's, when the established parties disintegrated and the Republican Party emerged.⁶⁹ Foner's point is that "Chase played a leading role in shaping the constitutional position of the anti-slavery North."⁷⁰ So strong was the influence of the Declaration of Independence on Republican thought that the Declaration was included in the 1856 Republican platform and was formally retained as official Republican Party policy at the 1860 Republican Convention.⁷¹

⁶⁹ E. FONER, *supra* note 41, at 73-102.

⁷⁰ *Id.* at 86. In his famous "Eleventh of March" speech, William H. Seward, another Moderate Republican, argued that "[t]he Constitution regulates our stewardship But there is a higher law than the Constitution" CONG. GLOBE, 31st Cong., 1st Sess. app. 265 (1850). Seward believed that it was the duty of politicians to assure that "laws . . . be brought to the standard of the laws of God." *Id.* at 263.

Men such as Seward and Chase dominated Republican constitutional thought before and during 1860. Berger errs in dismissing their influence and in entirely ignoring Foner's careful and convincing analysis of the various wings of the Republican party. Foner stresses that, by 1860, Radicals such as Sumner, Chase, Joshua Giddings, Owen Lovejoy, George Julian, and Thaddeus Stevens had an influence and a popularity far beyond their numbers. They saw both politics and the Union as a means toward the end of extirpating slavery. They generally represented districts located in New England or composed of transplanted New Englanders across the northern tier of the Midwest, and they had shared early political battles as Conscience Whigs, Free Soilers, or New York Barnburners. While they disagreed on economic issues, "the slavery issue had shaped their political careers." E. FONER, *supra* note 41, at 105.

As Foner and other historians make clear, the split between the Garrisonian immediatist-absolutists and the more politically inclined Republican Radicals was something of "a lover's quarrel." M. DILLON, *supra* note 41, at 146; see E. FONER, *supra* note 41, at 302-03. Furthermore, as Foner notes, the secession crisis of 1860 produced "[t]he radicals' commitment to the Union and federal supremacy . . . and once made, it was pursued in the same uncompromising spirit as characterized their every action." *Id.* at 143. Even Wendell Phillips found himself suddenly a Unionist after Fort Sumter, thereby departing from almost thirty years of encouraging secession from or by the Slave Power. Phillips declared that the Declaration of Independence would be "the war-cry of the North," producing the final triumph of brotherhood and racial equality. G. FREDRICKSON, *supra* note 32, at 62.

⁷¹ See E. FONER, *supra* note 41, at 133. The 1860 Republican platform also expressed opposition to any laws, state or federal, which abridged or impaired the rights of immigrants. The fourteenth plank of the platform pledged the Party to "giving a full and efficient protection to the rights of all classes of citizens, whether native or naturalized, both at home or abroad." *Id.* at 257 (emphasis added). This action is particularly striking in the context of the political clout of nativists and the Know-Nothing Movement. See D. POTTER, *THE IMPENDING CRISIS* 250-59 (1976).

Richard Sewell summarizes: "What is surprising, perhaps—given the bigotry of the age—is that nearly all Republicans defended the Negro's manhood and insisted that he be accorded those inalienable rights set forth in the Declaration of Independence." R. SEWELL, *supra* note 41, at 327.

Berger is correct, of course, in his assertion that many Northerners were Negrophobic. That does not mean that they all were, or even that a majority in most Northern congressional districts were racist in a sense capable of direct translation to today. Nor does it prove that a majority of their elected representatives were committed to pandering to prevalent racism. For example, Berger entirely misses the point of a statement by Representative George Julian that "the real trouble is that *we hate the negro*."⁷² Berger's reading of this statement in isolation clearly indicates to him that Julian hated the Negro.⁷³ Read in the context of Julian's speech and of his entire career, however, the statement is clearly a lament on the difficulty in overcoming race hatred, not an endorsement of it.⁷⁴ Like Thaddeus Stevens, and many others, Julian assumed a Burkean position and attempted to lead rather than to follow his countrymen on racial matters.⁷⁵ Scholars continue to debate the extent of racism in the North.⁷⁶ Yet Berger pays this complexity no heed, just as he ignores the troublesome issue—contemporary⁷⁷ as well as historical—of exactly how to determine what it is to be racist in order to tell who is guilty of racism.

Berger emphasizes that abolitionists were loathed in the North, a fact sufficiently documented for him by the murder of Elijah Lovejoy in 1837 and by autobiographic remarks by Justices Miller and Holmes.⁷⁸ The popularity of the abolitionists oscillated, of course,

⁷² CONG. GLOBE, 39th Cong., 1st Sess. 257 (1866) (emphasis in original).

⁷³ See p. 91.

⁷⁴ Berger could not have read the entire speech. Julian condemned "the old spirit of caste and the old law of hate which have so terribly blasted our land," CONG. GLOBE, 39th Cong., 1st Sess. 259 (1866), in several pages' worth of oratorical flourish in favor of the right of black suffrage in the District of Columbia. He proclaimed: "Sir, no fact is more notorious, and at the same time more discreditable, than the nearly universal prejudice of the white race in our country against the negro. That prejudice will not pass away swiftly, but gradually and slowly." *Id.* at 258. Julian most certainly was not claiming to be pleased about that prejudice; rather, he claimed that the vote for blacks was the most efficacious way to do something about it. "Sir, let one rule be adopted for white and black, and let us, if possible, dispossess our minds, utterly, of the vile spirit of caste which has brought upon our country all its woes." *Id.*

⁷⁵ See E. FONER, *supra* note 41, at 105. George Julian's Indiana district was strongly anti-slavery, see *id.* at 108, and Julian himself was known for his "doctrinaire morality" in the anti-slavery cause, *id.* at 206. Julian "had a special position as a spokesman of the old Midwestern abolitionists" and "did much to make negro suffrage acceptable to his section." W. BROCK, *supra* note 34, at 93; see K. STAMPP, *supra* note 31, at 102.

⁷⁶ Compare E. FONER, *supra* note 41, at 295-98, R. SEWELL, *supra* note 41, at 321-28, and H. TREFOUSSE, *supra* note 46, at 28-32 with L. LITWAK, NORTH OF SLAVERY 267, 269-72 (1961) and V.J. VOEGELI, FREE BUT NOT EQUAL 1-3 (1967). See generally G. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND (1971) [hereinafter G. FREDRICKSON, BLACK IMAGE].

⁷⁷ See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

⁷⁸ See pp. 11, 235 n.27. Justice Holmes' memory may have been a bit faulty, since he was at least an abolitionist fellow-traveller in his youth. See Touster, *In Search of Holmes from*

often because of external events. For example, the Fugitive Slave Law of 1850 was accepted generally in the North by 1852—after initial outrage against Daniel Webster for supporting it—as the final solution to the slavery problem and as the salvation of the Union. Many abolitionists despaired. By 1854, however, the Fugitive Slave Law was widely excoriated. The Kansas-Nebraska Act, several dramatic slave rescue attempts, and the publication of *Uncle Tom's Cabin* radically increased popular support for the antislavery crusade.⁷⁹

One paradigmatic illustration of the rapid shift in the fortunes of the antislavery movement was Horace Greeley's statement about President Pierce, and about the author of the Kansas-Nebraska Act, Senator Stephen A. Douglas: "Pierce and Douglas have made more abolitionists in three months than Garrison and Phillips could have made in half a century."⁸⁰ Fear of the Slave Power, coupled with the breakdown of the existing political parties and the 1857 bombshell of the *Dred Scott* decision,⁸¹ made it progressively more difficult to separate the fringe of radical abolitionist thought from that of mainstream antislavery ideology. Berger simply ignores the volatile intellectual and political climate that preceded—and prevailed during—the Civil War.⁸²

Paradoxically, even while Berger deprecates the impact of abolitionist thought, he relies upon abolitionists for vital elements of his interpretation of what the 39th Congress wrought. For instance, he dismisses the inclusion of any nasty, open-ended notions of substantive due process in the fourteenth amendment by using the following logical fallacy: substantive due process reared its many heads in *Dred Scott*; abolitionists "universally execrated" *Dred Scott*; ⁸³ therefore, Congress did not enact substantive due process. Berger's treatment of the impact of other key Supreme Court decisions—which had important and often explicit impact on a Congress composed of the highest proportion of lawyers ever ⁸⁴—is similarly

Within, 18 VAND. L. REV. 437, 447-51 (1965). Phillip Paludan notes that Sydney George Fisher, no flaming radical, recorded in 1863: "The term 'abolitionist' has ceased to be one of reproach." P. PALUDAN, *supra* note 17, at 202.

⁷⁹ See, e.g., S. CAMPBELL, *THE SLAVE CATCHERS* 49-95 (1970); M. DILLON, *supra* note 41, at 175-95; L. FILLER, *supra* note 41, at 228-57; E. FONER, *supra* note 41, at 93-95, 237; D. POTTER, *supra* note 71, at 38-44, 140, 164-67. Despite the historical record, Berger simply does not consider changes in the thought or voting patterns of the North during the 1850's, which marked the greatest political upheaval in our history.

⁸⁰ R.G. GETTEL, *HISTORY OF AMERICAN POLITICAL THOUGHT* 334 (1928).

⁸¹ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁸² See generally H. BELZ, *NEW BIRTH*, *supra* note 32.

⁸³ P. 204 n.36.

⁸⁴ See H. HYMAN, *A MORE PERFECT UNION* 302 (1973).

confused and incomplete. For example, Berger quotes *Prigg v. Pennsylvania*⁸⁵ as an example of a prevailing "deep-seated attachment to State sovereignty."⁸⁶ In fact, Justice Story's opinion in *Prigg* found implicit congressional power in article IV, section 2⁸⁷ to deprive Pennsylvania of authority to impose its own law in matters that affected the return of fugitive slaves.⁸⁸ As Professor Mark DeWolfe Howe stated, "If constitutional law had terminated with *Prigg v. Pennsylvania*, scholars and lawyers could confidently assert that there is nothing in the nature of American federalism that disables the Congress from controlling private conduct affecting the civil rights of others."⁸⁹

There was delicious irony in the opportunity to employ broad inherent federal power such as was recognized in *Prigg*—and utilized in *Dred Scott*⁹⁰ and *Ableman v. Booth*⁹¹ in defense of slavery—to nationalize the privileges and immunities guaranteed in the same article IV, section 2⁹² which required the return of fugitive slaves. The irony was not lost on members of the 39th Congress. Those decisions were often cited for precisely their support of broad federal power. For example, Representative James F. Wilson of Iowa, chairman of the House Judiciary Committee, said of them:

I am not willing that all of these precedents, legislative and judicial, which aided slavery so long, shall be brushed into oblivion when freedom needs their assistance. Let them now work out a proper measure of retributive justice by making freedom as secure as they once made slavery hateful. I cannot yield up the weapons which slavery placed in our hands now that they may be wielded in the holy cause of liberty and just government. We will turn the artillery of slavery upon itself.⁹³

⁸⁵ 41 U.S. (16 Pet.) 539 (1842); see p. 61 n.39.

⁸⁶ P. 60.

⁸⁷ U.S. CONST. art. IV, § 2, provided in pertinent part: "No Person held to Service or Labour in one State . . . escaping into another, shall . . . be discharged from such Service or Labour, but shall be delivered upon Claim of the Party to whom such Service or Labour may be due."

⁸⁸ 41 U.S. (16 Pet.) at 621-26. Berger's use of *Prigg* is akin to the sheer "chutzpah" in his opening salvo, in which he relies on *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), to illustrate basic democratic limitations on judicial power. P. 2 n.4.

⁸⁹ Howe, *Federalism and Civil Rights*, in A. COX, M.D. HOWE & J. WIGGINS, CIVIL RIGHTS, THE CONSTITUTION AND THE COURTS 30, 45 (1967).

⁹⁰ 60 U.S. (19 How.) at 435-51.

⁹¹ 62 U.S. (21 How.) 506, 517-22 (1859).

⁹² U.S. CONST. art. IV, § 2 provides in pertinent part: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

⁹³ CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866); see *id.* at 1294 (remarks of Rep. Wilson).

Federal power, once used to compel the return of slaves, would now compel their freedom.

Berger classifies Representative Wilson as "a member of the decisive Conservative-Moderate coalition"⁹⁴ who was "in tune with the limited Republican goals."⁹⁵ Blithely, Berger thereby enters the bloody minefield of Reconstruction historiography, but he makes no reference to the sophisticated debate among historians about how properly to classify Reconstruction congressmen across a variety of political and economic spectra.⁹⁶ Indeed, he seems only vaguely aware of the waves of revision and rebuttal among historians since World War II. We have moved far beyond the William A. Dunning⁹⁷—Claude G. Bowers⁹⁸ view of "Thad and his Rads" cracking the party whip in their desire to punish the South.⁹⁹ Yet, with disarming simplicity, Berger asserts that "[t]he converse of the fact that the 'radicals did not dominate' is that the Conservative-Moderate coalition did."¹⁰⁰

C. Federal Protection of Civil Rights

Even the leaders of what Berger denominates the controlling Conservative-Moderate coalition, however, like Representative James Wilson¹⁰¹ and Senator Lyman Trumbull of Illinois, sponsor of the Civil Rights Act of 1866, insistently talked of sweeping fundamental civil rights, rights "such as"¹⁰²—not, as Berger would have it, rights "limited to"—those which Justice Washington enumerated in *Corfield v. Coryell*.¹⁰³ Senator Trumbull, for example, whose "spare, lean" speaking style Berger contrasts to Congressman Bingham's

⁹⁴ P. 224.

⁹⁵ P. 40 n.15.

⁹⁶ The best two recent efforts to place the men of the 39th Congress along the political spectrum are M. BENEDICT, *supra* note 31, and D. DONALD, *THE POLITICS OF RECONSTRUCTION* (1965). See generally W. BROCK, *supra* note 34, at 61-95; E. FONER, *supra* note 41, at 104.

⁹⁷ Dunning was the teacher of a generation of historians, many of whom were Southerners, whose views of a vindictive North and a corrupt Reconstruction policy dominated historiography of the period for almost fifty years. See generally W. DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS* (1897).

⁹⁸ See C. BOWERS, *THE TRAGIC ERA* (1929).

⁹⁹ For an early analysis of Reconstruction historiography, see Weisberger, *The Dark and Bloody Ground of Reconstruction Historiography*, 25 J. SOC. HIST. 427 (1959).

¹⁰⁰ P. 237 (quoting M. BENEDICT, *supra* note 31, at 27).

¹⁰¹ See notes 17 & 20 *supra*.

¹⁰² CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (remarks of Sen. Trumbull).

¹⁰³ 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

overblown rhetoric,¹⁰⁴ rather liked to refer to guaranteeing "inherent, fundamental rights which belong to free citizens or men in all countries."¹⁰⁵ Trumbull introduced the Civil Rights Act of 1866 to assure that the "trumpet of freedom that we have been blowing throughout the land" would in fact protect "such fundamental rights as belong to every free person."¹⁰⁶

In summarizing a basic element of the political theory of most of his Republican colleagues, Trumbull broadly stated that he could not understand opposition to the Act

on the part of any one who admits that negroes are now entitled to the same rights as white people; and not only that there can be no objection to it but that there is a *positive duty* upon us to pass such a law if we find discriminations still adhered to in the States where slavery has recently existed.¹⁰⁷

¹⁰⁴ P. 112 n.51.

¹⁰⁵ CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866). Berger quotes this very speech, p. 42, but omits with ellipses Trumbull's broad reference to universal fundamental rights. He also fails to quote Trumbull's next words, which were that these fundamental rights were "such as the rights enumerated in this bill, and they belong to them in all the States of the Union." CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

Trumbull's statement was in direct response to Johnson's veto message in which Johnson relied upon a strong state sovereignty argument. Trumbull stated quite clearly that all citizens have basic inalienable rights; that these rights include—but are not limited to—those enumerated in the Civil Rights Act; and that they are rights in all the states, and therefore not dependent on whether or not individual states afforded certain protections to certain citizens. *Id.* at 1756-57.

¹⁰⁶ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). There is widespread agreement that Trumbull, who was chairman of the Senate Judiciary Committee, was a Moderate, or even a Conservative. Certainly, he was no Radical. *See, e.g.*, H.K. BEALE, *THE CRITICAL YEAR* 111 (1930); W. BROCK, *supra* note 34, at 104-05; B.B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 251 (1914). Trumbull was a complex character who faced a tough reelection campaign in Illinois. *See* Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 139 n.37 (1950). The very title of his biography illustrates the problem of categorizing Trumbull and many other Republicans of the period, though Mark Krug terms Trumbull a Moderate in 1866. M. KRUG, *LYMAN TRUMBULL: CONSERVATIVE RADICAL* 233, 242-44 (1965). The central point, however, is not how properly to categorize Trumbull. Rather, it is that someone who was a leading Moderate repeatedly argued for full federal protection of fundamental rights for all citizens throughout the United States.

¹⁰⁷ CONG. GLOBE, 39th Cong., 1st Sess. 605 (1866) (emphasis added). Trumbull elsewhere, more broadly, did not limit the rights guaranteed by his Freedmen's Bureau and Civil Rights Bills to the states which had recently had slavery. For example, he hoped "to secure freedom to all persons within the United States, and protect every individual in the full enjoyment of the rights of person and property and furnish him with the means for their vindication." *Id.* at 77.

The Freedmen's Bureau Bill, which Senator Trumbull introduced contemporaneously with the Civil Rights Act of 1866, made the point explicitly. It prohibited refusal or denial of basic rights "in consequence of any State or local law, ordinance, police, or other regulation, custom, or prejudice." *Id.* at 209. And Trumbull believed it "a positive duty" to protect freedmen "if we find discriminations still adhered to in the States." *Id.* at 605. The "obligation to take care of

In pushing for the Freedmen's Bureau Bill, Trumbull similarly maintained the need to "protect [the freedmen] in their new rights,"¹⁰⁸ and argued that "the obligation to take care of them is a Constitutional obligation imposed upon us as a Government."¹⁰⁹ His basic political point was that allegiance and governmental protection were reciprocal obligations.¹¹⁰ Blacks courageously demonstrated their allegiance under Union arms, and more could be expected to do so at the ballot box—no doubt to the political benefit of the Republican Party. The federal government therefore owed them protection of their basic rights throughout the land.¹¹¹ But what were "such fundamental rights as belong to every free person"?

them" became a "constitutional obligation imposed upon us as a government" because of the sorry situation in which the freedmen found themselves. *Id.* at 323, 937. The Freedmen's Bureau Bill afforded affirmative protection, and it was not keyed to discriminatory state legislation. For a discussion of competing impulses of paternalism and recognition of individualistic rights in treatment of the freedmen, see H. BELZ, *NEW BIRTH*, *supra* note 32, at 69-112.

Trumbull "never doubted" that the thirteenth amendment was sufficient basis "for Congress to protect every person in the United States in all the rights of person and property belonging to the free citizen." *CONG. GLOBE*, 39th Cong., 1st Sess. 77 (1866). Furthermore, Trumbull asserted, the freedman "must be fully protected in all his rights of person and of property." *Id.* Without any suggestion of a state action limitation, Trumbull declared, "any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the States and local authorities, by legislation or otherwise, deny these rights, it is incumbent on us to see that they are secured." *Id.* (emphasis added). To Trumbull, the thirteenth amendment was not merely declaratory, and he rejected the Seward interpretation that its enforcement clause actually limited congressional power. Rather, the thirteenth amendment was sufficient for Congress to do its duty to "break down all discrimination between black men and white men." *Id.* at 599. Trumbull stated: "I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land . . . [H]e must be fully protected in all his rights of person and property." *Id.* (emphasis added).

¹⁰⁸ *CONG. GLOBE*, 39th Cong., 1st Sess. 937 (1866).

¹⁰⁹ *Id.* at 323. Trumbull did not distinguish between the rights of all free men, since § 7 of the Freedmen's Bureau Bill and § 1 of the Civil Rights Bill contained identical enumerations.

¹¹⁰ *Id.* at 1757; *see id.* at 474. On July 30, 1863, President Lincoln issued an Order of Retaliation for the mistreatment of black soldiers captured by the Confederacy. He proclaimed a strict eye-for-an-eye policy. He began: "It is the duty of every government to give protection to its citizens, of whatever class, color, or condition, and especially to those who are duly organized as soldiers in the public service." 6 A. LINCOLN, *supra* note 61, at 357. That the reciprocity of allegiance and protection between citizens and the government was not limited to soldiers was emphasized by an opinion of the Attorney General protecting free black masters of vessels. The opinion, issued by Lincoln's Conservative Attorney General Edward Bates on November 29, 1862, distinguished between political and civil rights. It merits attention as an essay on "the duty of allegiance and the right to protection . . . correlative obligations, the one the price of the other." 10 Op. Att'y Gen. 382, 395 (1862). For a nearly contemporaneous speech expressing similar views, but defining citizenship rights more broadly, *see CONG. GLOBE*, 37th Cong., 2d Sess. 1638-40 (1862) (remarks of Rep. Bingham).

¹¹¹ *See CONG. GLOBE*, 39th Cong., 1st Sess. 599, 1757 (1866) (remarks of Sen. Trumbull). Trumbull quoted the Declaration of Independence, *id.* at 474, and repeatedly referred to "inalienable rights, belonging to every citizen of the United States, as such, no matter where he

Berger's position is that the framers of the fourteenth amendment had only limited rights in mind. He asserts that the framers intended merely to constitutionalize the severely limited privileges and immunities that, he argues, were specified carefully in the Civil Rights Act of 1866. To understand the limited nature of the rights enumerated in the Act, Berger claims, we must look back to the limited definition of privileges and immunities provided in *Corfield v. Coryell*¹¹² in 1823. Berger apparently does not accept Harold Hyman's point that, after the Civil War, "[a]ll certitude vanished with respect to workaday civil rights."¹¹³ Once again, Berger quotes selectively. Indeed, he ignores several basic phrases in the text of Justice Washington's opinion in *Corfield* because they do not fit his theory of a specific, shopping-list approach to privileges and immunities.

A careful exegesis of even that portion of the text of *Corfield* which Berger does quote¹¹⁴ discloses, for example, that Justice

may be," since "American citizenship would be little worth [sic] if it did not carry protection with it." *Id.* at 1757.

At one point, Trumbull did assure that the Civil Rights Act would "have no operation in Massachusetts, New York, Illinois, or most of the States of the Union." *Id.* at 1761. But this remark was premised on a duty-to-protect approach—it was preceded by the statement "[t]his bill in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property." *Id.* (emphasis added). L. LITWACK, *supra* note 76, has shown that Trumbull may have been mistaken in his factual assumption about the amount of protection afforded blacks in the North. See generally G. Henry, *Radical Republicans' Policy Toward the Negro During Reconstruction* (1963) (unpublished Ph.D. thesis on file in the Yale University Library). But that does not contradict Trumbull's legal theory—that government had a duty to protect fundamental rights.

Other Congressmen stressed that same duty in similar, albeit more sweeping terms. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1151-52 (1866) (remarks of Rep. Thayer); *id.* at 1159-60 (remarks of Rep. Windom); *id.* at 1293 (remarks of Rep. Shellabarger); *id.* at 1294-95 (remarks of Rep. Wilson). A similar theory concerning state duties may even be found in the South. See W.L. FLEMING, *DOCUMENTARY HISTORY OF RECONSTRUCTION* 243-72 (1907).

That the obligation of protection could be paternalistic is made clear by Senator Trumbull's "lean" rhetoric. Trumbull argued that laws should be passed

with a view to educate, improve, enlighten, and Christianize the negro; to make him an independent man; to teach him to think and to reason; to improve that principle which the great Author of all has implanted in every human breast, which is susceptible of the highest cultivation, and destined to go on enlarging and expanding through the endless ages of eternity.

CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866). This may be traditional political rhetoric, but it is a far cry from a hands-off governmental role that would leave all citizens to their own competitive devices. Because of its responsibilities, Trumbull stated, "I am not prepared to cast a vote which shall declare that all the powers exercised by this Government in former times in behalf of slavery shall not be exercised in behalf of the freedom of the citizen and his ample protection in all his fundamental rights." *Id.*

¹¹² 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

¹¹³ H. HYMAN, *supra* note 84, at 425.

¹¹⁴ Pp. 31-32.

Washington described his statement of privileges and immunities in article IV, section 2 as "comprehended under the following general heads."¹¹⁵ General heads do not constitute the narrowly defined and carefully adumbrated specific rights claimed by Berger. Furthermore, the very first "general head" Justice Washington listed was "Protection by the government."¹¹⁶ This phrase would seem to indicate something more than the passive governmental role Berger constantly posits, and it is in keeping with political thought of the time, in which it was widely believed that government owed a duty to afford remedies for rights.¹¹⁷ In addition, Justice Washington's statement of the rights government was bound to protect was far broader than Berger claims. Justice Washington wrote of "[t]he enjoyment of life and liberty, with the right to acquire and possess property of every kind, *and to pursue and obtain happiness and safety*."¹¹⁸ This statement encompasses much more than the "very limited objectives" that Berger insists constituted the understanding of privileges and immunities in the 39th Congress' reliance on *Corfield*.¹¹⁹ In fact, Justice Washington clearly went beyond asserting protection of life, liberty, and property; he included rights resonating with natural rights and the Declaration of Independence.¹²⁰ The right to pursue and obtain happiness and safety, for example, was explicitly added to rights in property.¹²¹ The text of *Corfield* itself cannot be reconciled with Berger's insistence that, by intending to legislate the *Corfield* rights, the members of the 39th Congress meant to limit the protections they afforded to a narrowly understood trinity of "life, liberty

¹¹⁵ 6 F. Cas. at 551.

¹¹⁶ *Id.*

¹¹⁷ For example, to define "privileges and immunities," a lawyer in 1866 might have consulted Justice Story's famous treatise, *COMMENTARIES ON THE CONSTITUTION* (Boston 1833). There he would have found strikingly broad statements of federal power following *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), *see*, 3 J. STORY, *supra*, § 1240, at 117, and a basic notion that an independent judiciary was instituted to afford protection of the public and private rights of the citizens, *id.* § 1856, at 719-20. For a parallel invocation of *Prigg v. Pennsylvania*, *see* CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (remarks of Rep. Wilson).

¹¹⁸ 6 F. Cas. at 551-52 (emphasis added).

¹¹⁹ *E.g.*, pp. 48 & n.42, 103, 108, 116, 136, 146, 154 n.88, 169. That equal protection and privileges and immunities were not regarded as synonymous and therefore redundant in the years immediately following the Civil War was repeatedly made clear. *See* U.S. CONST. amend. XIV, § 1. In 1871, the Ku Klux Klan Act made it unlawful to conspire, *inter alia*, "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1985(c) (1976)) (emphasis added).

¹²⁰ 6 F. Cas. at 551.

¹²¹ *Id.* at 551-52.

and property.”¹²² The *Corfield* decision speaks in terms of general categories of governmental duty to protect absolute rights, including the right to pursue and obtain happiness.

Berger is so certain of the central thesis of his book that he does not notice when his own enumeration of the very limited rights the framers meant to protect is internally inconsistent. Whether the 39th Congress meant to track exactly or to incorporate the *Corfield* suggestion—not an enumeration, but a statement of general outline—of a basic collection of civil rights, the very list of civil rights guaranteed by the Civil Rights Act of 1866 contrasts strikingly with Berger’s interpretation.

Berger never quotes fully the first section of the Civil Rights Act of 1866. Yet he states that the limited, narrow objectives that he perceives in section 1 of the Act are the key to his claim that, in constitutionalizing the protections of the Act in the fourteenth amendment, the framers sought clearly to limit the rights they recognized. “An argument to the contrary,” Berger categorically asserts, “will find no solid ground in the debates of the 39th Congress.”¹²³

Comparing Berger’s selective quotation of what he apparently takes to be section 1 of the Act with section 1 as actually passed is instructive. Berger writes that section 1 of the Civil Rights Bill¹²⁴ provided “in pertinent part”:

“That there shall be *no discrimination in civil rights* or immunities . . . on account of race . . . but the inhabitants of every race . . . shall have the *same* right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and *equal benefit* of all laws and proceedings for the *security* of person and property, and shall be subject to *like* punishment . . . and [to] no[ne] other.”¹²⁵

The entire section 1 of the Act, as passed, provided:

That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to

¹²² Pp. 31-33.

¹²³ P. 36.

¹²⁴ Perhaps Berger means to distinguish between what he terms the “Civil Rights Bill,” which is what he quotes and what Senator Trumbull was proposing, and the “Civil Rights Act,” which is what finally passed. If that is the case, he is not discussing the Act upon which his fourteenth amendment theory rests. Berger does not indicate that he is making this distinction, and he appears to use the references interchangeably throughout the book.

¹²⁵ P. 24 (quoting S. 61, § 1, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (read by Sen. Trumbull)) (emphasis added by Berger) (quote corrected by the author).

be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, *in every State and Territory in the United States* to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and *to full and equal benefit of all laws and proceedings* for the security of person and property, *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.¹²⁶

It is not too much to expect someone who believes the Civil Rights Act of 1866 was "key" to the "central provision" of the fourteenth amendment¹²⁷ to explain, or at least to notice, that the text he quotes is not the text of the Act that passed.

Unfortunately, Berger's error is not limited to such glaring omissions. The difference between the selective quotation he offers and the full text of the bill from which he quotes is significant. The omitted portions indicate a broad affirmative declaration. Black citizenship was thereby proclaimed, and *Dred Scott* thereby buried. Rights in contract and property and to full and equal benefit of law were declared uniform in every state and territory. All citizens were to have the same rights—and the complete and equal benefit of all laws and proceedings for security of person and property—as enjoyed by paradigmatic white citizens. Any law or statute to the contrary was superseded.¹²⁸ Yet Berger can still assert—in the face of the statute he regards as key to understanding the fourteenth amendment—that "[n]o trace of an intention by the Fourteenth Amendment to encroach on State control . . . is to be found in the records of the 39th Congress!"¹²⁹

Berger summarizes *his* interpretation of the Civil Rights Act of 1866 as follows: "Shortly stated, freedmen were to have the same *enumerated* rights (as white men), be subject to like punishment, suffer no discrimination with respect to civil rights, and have the equal benefit of all laws for the security of person and property."¹³⁰

¹²⁶ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981, 1982 (1976)); see CONG. GLOBE, 39th Cong., 1st Sess. 1857 (1866).

¹²⁷ P. 20.

¹²⁸ S. 61, § 1, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (read by Sen. Trumbull).

¹²⁹ P. 18.

¹³⁰ Pp. 24-25 (emphasis in original).

Berger's very next statement is: "Patently these were limited objectives."¹³¹ He apparently believes that his characterization of the rights he summarizes as "limited" suffices to decide the issue; if repeated frequently enough—like The Bellman's words in *The Hunting of the Snark*—stating that the broad list is limited will make it so. A sweeping guarantee of enumerated rights *plus* a guarantee of no discrimination in civil rights and the full benefit of all laws for security of person and property will be rendered "precise" and transformed into "very limited objectives."¹³²

What for Berger is a typical example of these narrow and clearly defined rights follows directly in his text. Representative Lawrence stated that the Civil Rights Act would protect "the 'necessary incidents of these absolute rights,' that is, of 'life, liberty, and property,' lacking which those 'fundamental rights' could not be enjoyed."¹³³ Absolute and fundamental rights, *and their incidents*, were to be guaranteed by the federal government, and Berger believes that this is a clear example of very narrow legislative objectives. Berger seeks to avoid entirely the unbounded nature of absolute rights. He also fails to discuss the problem of interpretation posed by such absolute rights and their incidents.

D. Fixed Natural Rights and the Use of the Common Law

Even Berger must concede that natural rights were "kicking around" in 1866. He meets this problem by claiming that "'fundamental,' 'natural' rights had become words of received meaning."¹³⁴ To prove this received meaning, Berger cites Blackstone and Kent.¹³⁵ By assuming that fundamental and natural rights are fixed and narrow, Berger can squeeze such rights into his "specific," "narrow," "limited" Procrustean bed. His own quotations from the *Congressional Globe* contain frequent, broad references to absolute rights and to the national government's duty to protect them. There are many, many other quotations in the *Congressional Globe* which Berger does not give. Yet Berger insists that the natural rights in the Civil Rights Act "had acquired a settled common law meaning" through Blackstone.¹³⁶

¹³¹ P. 25.

¹³² P. 108.

¹³³ P. 25 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1883 (1866)) (emphasis added by Berger).

¹³⁴ P. 35.

¹³⁵ *Id.*; see pp. 20-21 & n.3.

¹³⁶ P. 102 n.15.

It is curious to find Blackstone used as a prime referent to discern the legal thought of 1866. Blackstone's star had fallen rather low during the course of the previous century, as both Cover and Horwitz make plain.¹³⁷ Furthermore, Blackstone himself was far from clear about fixed natural law meaning,¹³⁸ even before St. George Tucker began to interpret him to Americans.¹³⁹ One might have assumed that the introduction of what is traditionally the rather flexible common law approach to determine natural law rights would have upset so pure a textual positivist as Berger always assures us he is.¹⁴⁰ Yet somehow to Berger, a common law reference point to interpret absolute natural law rights does not inevitably implicate judge-made law. We are, after all, considering *only* protection for life, liberty, and property—the absolute rights and their necessary incidents—plus a smattering of protection against discrimination in civil rights and the guarantee of all laws for the security of person and property contained in section 1 of the Civil Rights Act of 1866.

Berger insists that it is the "very limited" section 1 of the Act which provides the "key" to the meaning of the privileges and immunities clause of the fourteenth amendment, which is that amendment's "central provision."¹⁴¹ Even if Berger is correct about looking to common law to discern the meaning of the natural rights identified and protected in section 1 of the Civil Rights Act—and soon thereafter constitutionalized in section 1 of the fourteenth amendment—he has himself destroyed his entire theory of strictly confined rights limited to settled meanings.

¹³⁷ R. COVER, *supra* note 42, at 26; M. HORWITZ, *supra* note 43, at 16-30.

¹³⁸ As Cover nicely puts it: "Like so many great primers in the social studies, Blackstone owed at least part of his success to a cultivated ambiguity about crucial and controversial issues. Nowhere was that ambiguity more apparent in the *Commentaries* than with respect to the import of natural law." R. COVER, *supra* note 42, at 25.

Cover suggests a possible reconciliation of Blackstone's absolutist natural law views and his positivism on something approaching Rule Utilitarian grounds. But that reconciliation is dependent in large part on the English Constitution, and on the role of Parliament as ultimate arbiter. It therefore does not translate entirely well into "American." Further, even Blackstone "was a constitutional positivist who yet retained a large place for natural law in terms of personal obligation outside that [English] constitutional structure." *Id.* at 26.

At times, Blackstone could sound remarkably like Wendell Phillips: "[T]his law of nature, being coeval with mankind, and dictated by God himself, is, of course, in all countries, and at all times. No human laws are of any validity, if contrary to this." 1 W. BLACKSTONE, *supra* note 62, at *41. It is difficult to discern the essence of fixed common law meanings from this notion of natural law.

¹³⁹ Tucker, who succeeded George Wythe as Professor of Law and the Police at William and Mary, produced an American edition of Blackstone in 1803. W. BLACKSTONE, *COMMENTARIES* (S.G. Tucker ed. Philadelphia 1803); see Cover, Book Review, 70 COLUM. L. REV. 1475 (1970). See generally W. JORDAN, *WHITE OVER BLACK* 555-60 (1968).

¹⁴⁰ See pp. 351-96.

¹⁴¹ See, e.g., pp. 20, 38-48, 102-16.

A great change had occurred by the 1860's from the fixed notions of common law of the Revolutionary era. Professor Morton Horwitz convincingly describes a legal landscape which by 1820 "bore only the faintest resemblance to what existed forty years earlier."¹⁴² It will not do to rely, as Berger does,¹⁴³ on Blackstonian notions, on quotations from Thomas Hutchinson, of all people,¹⁴⁴ or even from Chancellor Kent¹⁴⁵ to describe mid-nineteenth century legal thought. Berger is correct in asserting that in 1787 "[i]nstrumentalism' was yet to come."¹⁴⁶ He grossly misuses Professor Horwitz' point, however, in not noting that it *had arrived* by 1866. As early as the 1820's, Horwitz demonstrates, "common law rules were [being] conceived of as made and not discovered, [and] precedent was no longer regarded as a technique for assuring that judges would apply a preexisting law."¹⁴⁷ Thus, if section 1 of the Civil Rights Act was intended to refer to common law, it was not a reference to something "fixed."

In overlooking this point, Berger again confounds the role of judge and legislator, as he did when he missed Professor Cover's point about natural law. The distinction is central to the title of Berger's book and to his entire argument about judicial usurpation. If legislators in 1866 were enacting into positive law the natural law rights they perceived as basic but theretofore not protected, Berger's entire interpretation collapses. He fails to see that the relationship

¹⁴² M. HORWITZ, *supra* note 43, at 30.

¹⁴³ See p. 307.

¹⁴⁴ Reliance on the Tory Governor of Massachusetts is particularly peculiar in a book, such as Berger's, which is strident about strict separation of powers, since Hutchinson simultaneously held high office in the executive, legislative, and judicial branches of Massachusetts government. B. BAILYN, *THE ORDEAL OF THOMAS HUTCHINSON* 18, 52-53 (1974). Furthermore, the former Governor, Councilor and Chief Justice was not generally revered by Americans during his own time for his legal views. Indeed, Bailyn emphasizes that it was James Otis' "trans-judicial" reliance on "natural equity" against Hutchinson in Otis' arguments against the Writs of Assistance in 1763, and "not Hutchinson's scrupulous regard for the law as it existed," which "entered American awareness" and cost Hutchinson his political life. *Id.* at 56, 63. It seems unlikely that the legal thought of Thomas Hutchinson carried much weight with the men of the 39th Congress after a century and a Revolution.

¹⁴⁵ See pp. 21 & n.5, 22, 27, 35, 42, 144 n.47, 243. The High Federalist views of Chancellor Kent, who was "true to all the traditions—and prejudices—. . . of the complacent class to which by fortune he belonged," J. HORTON, *JAMES KENT* 55 (1939), did not constitute the essential source for defining civil rights after the upheaval of the Civil War. Had the men of the 39th Congress sought a basis for establishing the activist, interventionist judicial role Berger decries, however, they might have referred to Kent. See generally G.E. WHITE, *THE AMERICAN JUDICIAL TRADITION* 35-63 (1976). In fact, Berger himself quotes Kent: "'I might once & a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case.'" P. 321.

¹⁴⁶ P. 306.

¹⁴⁷ M. HORWITZ, *supra* note 43, at 27.

between positive law and the need to amend the Constitution was a relationship between "is" and "ought." Congressmen who referred to natural law and sought to guarantee fundamental rights hoped to bridge the gap between what had been and what ought to be in the Constitution. Many hoped to constitutionalize the Declaration of Independence; most intended to extend the law of fundamental rights, rights far different from the fixed Blackstonian rights readily discernible in the limited objectives of the common law. The common law was perceived as changing and changeable. Berger ignores this basic theme in Horwitz' impressive book. Instead, he establishes a constantly changing reference point—judge-made common law—as the keystone for his theory of fixed statutory and constitutional meaning.

In the wake of significant changes occasioned by the Civil War, legislators, who were granted new constitutional power by section 2 of the thirteenth amendment, sought to narrow the is/ought gap. They attempted to explode the illogic of a legal system, and a federalism, which had defined most of a race out of fundamental legal protection. To argue that the 39th Congress meant to protect only narrowly defined, carefully specified rights, the meaning of which the legislators believed to be fixed at common law, evinces a serious misconception and a basic failure to attend to the nuances and patterns of speech in the very "stenographic transcript" Berger seeks to interpret.

Berger is right—at least in part—about the relationship of the Civil Rights Act of 1866 to the fourteenth amendment. Section 1 of the fourteenth amendment was intended *at least* to constitutionalize the Civil Rights Act. But Berger is woefully mistaken about what it meant to constitutionalize the civil rights in section 1 of the Act. The best guess is that the 39th Congress intended anything but the narrow congressional power and the tight rein on federal judicial discretion which Berger asserts. A vital notion of a federal duty to protect freedmen and their white allies dominated. Congress sought to assure federal redress for any violations of federal civil rights. Federal courts were made available to protect broadly defined rights, and they were granted both criminal and civil powers to enable them to do so.¹⁴⁸

¹⁴⁸ Berger entirely ignores the jurisdictional aspects of the Civil Rights Act of 1866. See note 192 *infra*. The jurisdiction of the lower federal courts was increased significantly across various areas of litigation in the decade after the Civil War, culminating with the introduction of general federal question jurisdiction in the Judiciary Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875) (current version at 28 U.S.C. § 1331(a) (1976)). See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1927). See generally S. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 114-60 (1968); Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1876*, 13 AM. J. LEGAL HIST. 333-59 (1969).

Berger's preconceptions and his carelessness provide him with a convenient set of blinders. In particular, his misreadings of the work of Cover and Horwitz lead him to a conclusion actually opposite what is expressed in these sources. Far more serious than his misreading of these secondary works, though, is his erroneous interpretation of primary sources. I now turn to Berger's analysis of the "stenographic transcription of what was said."¹⁴⁹

II

BERGER'S READING OF THE CONGRESSIONAL GLOBE

So many references to the Declaration of Independence, to natural rights and to a fundamental alteration in the law may be found in the debates in the 39th Congress that one wonders how Berger ignored them. It would be tedious even to begin to quote the statements Berger omits. An obvious illustration of his startling penchant for selective quotation, however, is found in Representative Lawrence's statement in the very speech Berger describes as "patently" revealing the "limited objectives" of the Civil Rights Act.¹⁵⁰ In his speech, Lawrence stated that the Civil Rights Act, and the thirteenth amendment on which it was based, were "scarcely less to the people of this country than the Magna Charta was to the people of England."¹⁵¹

It is unnecessary to dwell on such omissions, however, for the very language that Berger does quote undermines his argument again and again. For example, Berger quotes an early speech by future President James A. Garfield of Ohio as a summary of congressional goals: "[P]ersonal liberty and personal rights are placed in the

¹⁴⁹ P. 6.

¹⁵⁰ P. 25.

¹⁵¹ CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866). Ironically, it is this same speech by Representative Lawrence that Justice Harlan stressed in his dissent in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 468 (1968). Justice Harlan missed entirely the duty-to-protect theme, see note 111 *supra*, clearly elucidated in Representative Lawrence's speech, just as Berger misses its overwhelming natural rights tone. Lawrence asserted that there are "anterior to and independently of all laws and all constitutions . . . certain absolute rights which pertain to every citizen, which are inherent, and of which a state cannot constitutionally deprive him." CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

Berger does not quote this part of the speech by the congressional "Moderate." Nor does he note that Lawrence was as explicit as one could be in saying that the right to governmental protection could be violated by either state action or *state failure to act*. Representative Lawrence said: "Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by *failure to protect any one of them*." *Id.* (emphasis added).

keeping of the nation, that the right to life, liberty, and property shall be guaranteed to the citizen in reality We must make American citizenship the shield that protects every citizen, on every foot of our soil.' ”¹⁵² Berger says of this speech: “That motive manifestly was at the heart of the Civil Rights Bill”¹⁵³ With a national commitment to the realistic guarantee of life, liberty, and property, how would substantive due process notions augment such rights? Why worry about application of the Bill of Rights to the states through incorporation, as opposed to natural law excrescences, if the federal government guaranteed all that?

Berger's answer is rather murky. He says that the protection intended to be guaranteed by men such as Lawrence and Garfield was limited to “*statutory* discrimination with respect to the rights enumerated in the Civil Rights Act”;¹⁵⁴ therefore, if whites did not have any of the enumerated civil rights in a specific state, there was no congressional power to fill the gap. Berger thus transforms absolute natural law rights which he claims have a settled meaning into a collapsible shield, good only in defense against statutory discrimination by the states. Berger assumes that Congress had and used power under the thirteenth and fourteenth amendments only to protect civil rights on a sliding scale as they were or were not recognized by specific states. There was no national standard of civil rights.

It is simply impossible to reconcile an intention to guarantee blacks fixed and absolute civil rights with an intention to defer to the states in the determination of what civil rights were to be protected. Berger cannot have it both ways. Congressmen differed greatly about how to define the rights of the new citizens and how far to go in supplying federal power and federal courts to vindicate those rights. They had to predict how the South would behave toward freedmen, what the new President would do, and how quickly and emphatically the electorate would desire a return to “normalcy.” It strains credulity, however, for Berger to insist over and over again that, since the Constitutional Convention in 1789, “[t]here is no inkling that . . . the North had become dissatisfied with the protection . . . given by the States”¹⁵⁵ or that there is “a presumption that the powers reserved to the States are not diminished by a subsequent amendment in the absence of a clear intention to do so.”¹⁵⁶

¹⁵² P. 40 (quoting CONG. GLOBE, 39th Cong., 1st Sess. app. 67 (1866)).

¹⁵³ *Id.*

¹⁵⁴ P. 176 (emphasis in original).

¹⁵⁵ P. 182.

¹⁵⁶ P. 243.

A civil war had been fought. Whether or not it was an irrepressible conflict, it certainly involved something other than Northern concern to protect states' rights and state sovereignty, which were concepts somewhat more in vogue in the Southern part of the country. The absolutist state sovereignty concept employed by Berger is simply not to be found in the debates recorded in the *Congressional Globe*. Nor is it obviously contained in the tenth amendment,¹⁵⁷ which reserves to the people powers which Berger vilifies as "opened." ¹⁵⁸ The tenth amendment figured far less prominently than did a desire—indeed, a perceived duty—to afford " 'equalized protection under equalized laws.' " ¹⁵⁹

Berger's claim that federal protection was limited to changeable state guarantees of rights folds back upon itself. His own argument destroys his assertion that the Civil Rights Act "painstakingly specified the limited rights to be protected."¹⁶⁰ Berger must deal with what he terms "the neoabolitionist theory" of Jacobus tenBroek and others, who argued that the Civil Rights Act provided national protection of certain minimal rights, whether or not the states were protecting such rights.¹⁶¹ One would think agreement with such a position a logical necessity for a scholar positing a fixed and clearly understood definition of specified rights; but Berger opts for an opposing interpretation in which the natural rights of life, liberty, and property were protected if and only if conferred on whites by a particular state. Tying this protection of fixed and absolute natural rights, defined at common law, to variable state law absolutely destroys Berger's arguments. Clearly established and fundamental common law rights, according to Berger's theory, would necessarily vary with changes in state law. They would therefore become unfixed; they could no longer be regarded as universally understood absolutes.

Instead of resolving this inconsistency, Berger goes on the attack against tenBroek for confusing full protection and equal protection:

If the laws supplied no protection, to whites or blacks, there was nothing to which the "equal" condition could attach. To state in this context that "'equal' protection of the laws and the 'full'

¹⁵⁷ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X (emphasis added).

¹⁵⁸ See pp. 99-116.

¹⁵⁹ P. 169 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1074 (1866) (remarks of Sen. Nye)).

¹⁶⁰ P. 211 n.67.

¹⁶¹ See pp. 34-36.

protection of the laws are virtually synonyms" departs from a decent respect for words—a half-glass given to all is "equal" though it is not "full."¹⁶²

The peculiarity of Berger's half-glassed argument, which posits a crucial distinction between full and equal protection, is emphasized by the very attention to text he purports to demand. Contained within section 1 of the Civil Rights Act of 1866 we discover, as Berger apparently did not, an enumerated right "to *full* and equal benefit of all laws and proceedings for the security of person and property."¹⁶³ Perhaps Berger entirely misses this assurance of "full" as well as "equal" legal redress because to concede its presence in the text of the Act would further unravel an already disjointed chapter in which Berger asserts that there is a clear and fixed meaning to "equal"—another term with which others have had more difficulty than he does. It is by no means easy to decipher exactly what Congress intended by its "full and equal benefit" guarantee.¹⁶⁴ But the guarantee of the "same right in every State and Territory" to "full and equal benefit of all laws and proceedings for the security of person and property" surely cannot be reconciled with Berger's assertion that the 39th Congress intended to guarantee *fixed* natural rights to both black and white citizens,¹⁶⁵ but that these rights were to be guaranteed on a sliding scale dependent upon and keyed to the largess of the individual states in assuring the rights in question to white citizens.

Berger does concede that Congressmen Bingham and Lawrence "maintained that the 'fundamental,' 'natural' rights were 'absolute,'

¹⁶² P. 177.

¹⁶³ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (emphasis added) (current version at 42 U.S.C. §§ 1981, 1982 (1976)); see p. 24.

¹⁶⁴ That the legislative use of the term "full" in addition to "equal" was not a mere slip of the draftsman's pen is illustrated, for example, by the language of the Civil Rights Act of 1875. In 1875, basing its legislation on the power granted by the Civil War amendments, Congress guaranteed to all persons, regardless of race or color, "the *full* and *equal* enjoyment of the accommodations . . . of inns, public conveyances on land or water, theatres, and other places of public amusement." Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335 (1875) (emphasis added) (invalidated in the Civil Rights Cases, 109 U.S. 3, 26 (1883)).

Language suggesting that Congress regarded the concept of "full and equal" as more than a cliché is contained in the Preamble to the same 1875 Civil Rights Act, which states that it is "essential to just government [that] we recognize the equality of all men before the law, and . . . that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political." "Full" and "equal" may not be synonyms, as tenBroek would have it, but that does not render "full" redundant or meaningless, as Berger seems to suggest.

¹⁶⁵ See note 33 *supra*.

and could not be withheld.”¹⁶⁶ His treatment of Bingham is instructive. When he spoke of absolute, natural rights, Bingham became to Berger “a confused, imprecise, and vacillating witness.”¹⁶⁷ Yet Berger grants Bingham a central role in the passage of the Civil Rights Act and regards him as “the architect of the Fourteenth Amendment.”¹⁶⁸

In fact, Berger hammers away at the eventual deletion of the broad first sentence of the initial text of section 1 of the Civil Rights Act.¹⁶⁹ Berger takes the deletion, first requested by Bingham, to be a crucial indicator of Bingham’s thought and, through him, of the thought and clear intent of the entire 39th Congress. Berger says of Bingham’s suggestion: “Deletion of this sentence . . . adds up to a States’ Rights manifesto.”¹⁷⁰ He further asserts that “Bingham was in accord with the restricted objectives of almost all of his Republican

¹⁶⁶ P. 181 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1089-90, 1832 (remarks of Reps. Bingham and Lawrence)).

¹⁶⁷ *Id.*

¹⁶⁸ P. 119.

¹⁶⁹ Section 1 of the Act, as first presented by Senator Trumbull, began with the assertion that “there shall be no discrimination in civil rights or immunities . . . on account of race.” S. 61, § 1, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (read by Sen. Trumbull). That phrase was ultimately deleted, to the dismay of Alfred Kelly and the other historians assisting Thurgood Marshall and his legal team in *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See R. KLUGER, *SIMPLE JUSTICE* 635-37 (1976).

The phrase was not deleted in direct support of Bingham’s suggestion, however, as Berger would have it. Indeed, Representative James F. Wilson, the Chairman of the Judiciary Committee that finally agreed to its elimination, asserted that it did not materially change the bill to eliminate the phrase, and that its elimination simply would avoid the possibility of a “latitudinarian construction.” CONG. GLOBE, 39th Cong., 1st Sess. 1366 (1866). Wilson had been Bingham’s opponent in the debate over Bingham’s proposed deletion. Therefore, to attribute a great deal to the deletion—after Bingham’s motion was overwhelmingly defeated, see text accompanying note 173 *infra*—is to guess about silent legislative intent, and not simply to read the legislative transcript, as Berger purports to do.

Alexander Bickel also perceived clarity in the backroom agreement to delete the phrase, which he took to indicate that “[t]he Moderate position that the bill dealt only with a distinct and limited set of rights was conclusively validated.” Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955). That even Bickel could become entangled by the mysteries of silent legislative activity, however, is illustrated by his description of the last compromise offered by the Moderates in the drafting of the fourteenth amendment. *Id.* at 40-43. Senator Stewart’s proposed language looks almost exactly like the famous deleted phrase from § 1 and does not by any means indicate a devotion to “distinct and limited rights.” As Bickel recounts, Senator Stewart and the other Moderates would have exchanged amnesty for an amendment that read: “All discriminations among the people because of race, color, or previous condition of servitude, either in civil rights or the right of suffrage, are prohibited” S.J. RES. 62, § 1, CONG. GLOBE, 39th Cong., 1st Sess. 1906 (1866) (introduced by Sen. Stewart); see Bickel, *supra*, at 41 n.78. If this was a compromise offered by the Moderates, lacking any state action restriction and guaranteeing unspecified civil rights and suffrage, one wonders what a Radical proposal might have looked like.

¹⁷⁰ P. 120; see pp. 24 n.15, 34 n.53, 38, 212 n.74.

colleagues who spoke to the measure.”¹⁷¹ When Bingham’s unenigmatic language disagrees with Berger’s interpretation, however, even Berger must ask: “How can ‘conclusive’ legislative history rest on shifting sands?”¹⁷² Berger also omits mention of the actual vote on Bingham’s proposed deletion, which he supposes to have been so popular and so significant. Bingham’s motion was resoundingly defeated, one hundred and thirteen to thirty-seven, with thirty-three abstentions.¹⁷³ This tally perhaps indicates something of how broad was the support on the floor of the House for any states’ rights manifesto Bingham intended to issue.

III

THE POLITICAL CONTEXT

A. The Post-Civil War World

Berger has missed the crucial, but elusive, point that the Civil War was a kind of telophase. A new world had been created. There were fundamentally new assumptions. Legal rights and remedies were redefined. The character of the nation, the role of federal power and, in the context of a rapidly disintegrating relationship with the President, the appropriate role of Congress underwent significant alterations. The immediate focus for all these concerns was the question of the circumstances under which the South was to be restored or reconstructed. The period from the convening of the 39th Congress to the emotional release which followed the Johnson impeachment was an optimistic time, the nation self-consciously aware of the discontinuity occasioned by the war. Henry Adams, speaking of his return to the United States after having been away during the war years, described the sea change in characteristic fashion: “Had they been Tyrian traders of the year B.C. 1000, landing from a galley fresh from Gibraltar, they could hardly have been stranger on the shore of a world, so changed from what it had been ten years before.”¹⁷⁴ Morton Keller terms the Civil War “the great watershed in the history of the American nation”;¹⁷⁵ George Clemenceau, in Washington as a young French journalist, viewed Reconstruction as “the great

¹⁷¹ P. 120.

¹⁷² P. 145.

¹⁷³ CONG. GLOBE, 39th Cong., 1st Sess. 1296 (1866).

¹⁷⁴ H. ADAMS, THE EDUCATION OF HENRY ADAMS 237 (1918).

¹⁷⁵ M. KELLER, AFFAIRS OF STATE 1 (1977).

American revolution.”¹⁷⁶ In an influential article published in 1964, Arthur Bestor wrote: “When the nation finally emerged from three decades of corrosive strife, no observer could miss the profound alterations that its institutions had undergone.”¹⁷⁷

Berger is not aware that, as David Potter put it, “the winter of 1860-61 marked the last stand of the old Federal Union, state-centered rather than nation-centered in its orientation.”¹⁷⁸ For Berger, the Civil War had no impact on the states’ rights and state sovereignty theories he wishes to impose as the postwar congressional intent. Even historians who emphasize the mixed and inconsistent nature of Northern support for equality—C. Vann Woodward¹⁷⁹ and V. Jacque Voegeli,¹⁸⁰ for example—portray a war effort that changed focus from an initial goal of preservation of the Union to a fight to guarantee freedom. The heroism of black troops, mistreatment of freedmen in the South, and religious and nationalistic fervor “inspired men to grasp for goals that went beyond the abolition of slavery.”¹⁸¹ By the end of the war, a black minister had given the opening prayer in the House of Representatives, a black lawyer had been admitted to the Supreme Court Bar, and President Lincoln had conferred publicly with Frederick Douglass and had invited blacks to public receptions and to the White House grounds. “[I]dealistic concern for the Negro was not an insignificant impulse shared only by a few men of noble intellect; rather, it was a compulsive and complex force that powerfully shaped the minds and actions of the racial reformers and of the great body of Republicans.”¹⁸²

It is hardly surprising that Republicans emerged from the war divided over how to apply their abstract belief in egalitarian dogma.

¹⁷⁶ G. CLEMENCEAU, *AMERICAN RECONSTRUCTION* 79 (1928).

¹⁷⁷ Bestor, *The American Civil War as a Constitutional Crisis*, 69 *AM. HIST. REV.* 327, 327 (1964). Bestor provides a useful outline of the conflicting constitutional theories and differing views about federalism prevalent at the brink of the Civil War.

¹⁷⁸ D. POTTER, *supra* note 71, at 515.

¹⁷⁹ C. Vann Woodward argued that in the North the Civil War changed from a war for union to a war for freedom and then to a war for equality. C.V. WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 69-87 (1960). He later disavowed the final point and stressed the equivocal nature of the fourteenth amendment and the mixed motives of the North, which feared a black invasion. Woodward, *Seeds of Failure in Radical Race Policy*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 125, 127-28 (H. Hyman ed. 1966). But contrary to Berger, Woodward noted improvement in racial attitudes during the last two years of the war and a commitment to equality “capable of numerous interpretations.” *Id.* at 130.

¹⁸⁰ V.J. VOEGELI, *supra* note 76, at 119-20.

¹⁸¹ *Id.* at 162.

¹⁸² *Id.* at 167. See generally R. SEWELL, *supra* note 41.

They shared mixed motives as well as idealistic humanitarian concern.¹⁸³ But it is surprising that someone like Berger, who purports to do a history of the legal thought of the period, can altogether overlook the complexity and mutability of popular and political thought on such matters as race and federalism immediately following the Civil War. Perhaps Berger's aesthetic of order cannot tolerate notions of change. He can quote Morton Keller repeatedly for references to Northern Negrophobia, yet fail to notice Keller's central point that

[e]very sector of the postwar polity went through a strikingly similar evolution during the years that followed the Civil War. At first the wartime legacy of active, expanded government and a broader view of civil equality left its mark everywhere: in Congress and the courts, in the victorious North as well as the defeated South, in a broad range of social and economic policies. Then in the 1870's this tendency was widely repudiated.¹⁸⁴

The possibility of oscillation is foreign to Berger's world of static text and static history.

Important recent studies by Harold Hyman and by his students, Phillip S. Paludan and Michael Les Benedict, emphasize that despite all the changes, Americans continued a tradition of constitutional evolution and of playing by familiar rules. But Berger misrepresents their sophisticated argument when he cites their work in passing to support his belief in a fixed and limited civil rights guarantee, based upon an attachment to state sovereignty and to the tenth amendment.¹⁸⁵ Paludan, for example, argues not that the 39th Congress directly limited itself because of state sovereignty, but rather that the fourteenth amendment was "meant to provide the possibility of changing the federal system so that equal rights might be protected by the national government."¹⁸⁶ The Hyman-Paludan-Benedict position is that Congress could not accomplish what it set out to do because, both subtly and explicitly, "Reconstruction measures were fitted with

¹⁸³ G. FREDRICKSON, *BLACK IMAGE*, *supra* note 76, at 323.

¹⁸⁴ M. KELLER, *supra* note 175, at 36.

¹⁸⁵ One does not find many references to the tenth amendment in the debates of the 39th Congress. Berger does not find a single reference to quote. His frequent reliance on the tenth amendment, therefore, appears based on his own interpretation, akin to that of Justice Rehnquist for the Court in *National League of Cities v. Usery*, 426 U.S. 833, 842-43 (1976). Berger's interpretation is also flawed in that it overlooks that amendment's text. See text accompanying note 157 *supra*.

¹⁸⁶ P. PALUDAN, *supra* note 17, at 51-52.

conservative constitutional shackles.”¹⁸⁷ This occurred despite “a national presence within the states that was unique in American history,”¹⁸⁸ because Reconstruction was primarily left up to the branch of the federal government “most likely to preserve the law and the Constitution in their traditional forms—the judiciary.”¹⁸⁹

It was largely the decision to leave matters to the judiciary, and to case-by-case evolution, that undermined the congressional Reconstruction policy.¹⁹⁰ Sections of the Civil Rights Act of 1866 that Berger altogether ignores created both federal criminal penalties and removal to federal courts for the rights specified in section 1.¹⁹¹ The Act echoed the Fugitive Slave Law of 1850 in affording federal commissioners a broad role and in guaranteeing federal muscle to enforce the rights provided.¹⁹²

An explicit and broad prospective grant of constitutional power, illustrated by section 2 of the thirteenth amendment and section 5 of the fourteenth amendment, was something new. The very existence of ongoing and open-ended enforcement power threatens Berger's strict construction of constitutional limits. The enforcement clauses of the Civil War amendments indicate a new genre of constitutional provision, explicitly doing something quite different from limiting governmental power. Yet Berger gives section 5 of the fourteenth amendment short shrift.¹⁹³

¹⁸⁷ *Id.* at 54.

¹⁸⁸ *Id.* at 52-53.

¹⁸⁹ *Id.* at 54.

¹⁹⁰ See H. HYMAN, *supra* note 84, at 245-81.

¹⁹¹ Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866).

¹⁹² *Id.* § 4. Berger focuses on section 1 and pays no attention to the other eight sections of the Act. These sections include provision for federal criminal penalties and for institution of suits by federal officials, *id.* § 2; they outline a broad role for the increased number of U.S. Commissioners, *id.* § 4; and they authorize the use of federal forces or militia if necessary to enforce the Act, *id.* § 9. These sections rather clearly appear to override antebellum concerns about state sovereignty.

For a nearly contemporaneous discussion of the breadth of the power invoked by Congress in all sections of the Civil Rights Act of 1866, see Justice Swayne's opinion in *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

¹⁹³ Berger interprets congressional enforcement power in section 5 of the fourteenth amendment to exclude altogether judicial discretion to enforce the amendment. His argument is quite truncated, but its central point is clear: “The face of § 5 indicates that the ‘discretion’ was *entirely* confided to Congress, and the debates confirm that the ‘responsibility’ for enforcement was imposed upon Congress, thus confirming the maxim that a direction to act in one mode excludes another.” Pp. 228-29 (emphasis in original). This peculiar assertion raises several problems: the fourteenth amendment says nothing about “discretion” for either Congress or the judiciary; the debates are full of references to judges construing the Civil Rights Act; and the Act itself, alleged by Berger to have been constitutionalized in the fourteenth amendment, has several sections directly providing for federal court suits to enforce it. Berger himself quotes an example from the debates, in which he refers to Senator Howard of Michigan: “Howard knew

Berger pays no attention whatsoever to the specific political context in which the Civil Rights Act of 1866 was passed and in which Congress overrode President Johnson's veto. He ignores the early decisions construing the Act, prior to the ratification of the fourteenth amendment, decisions one would assume to be significant in a search for the "original intent" contained in the language of the Civil Rights Act. Perhaps because Berger has faith that the framers of the fourteenth amendment left a "transcript of their minds" that emphatically "is free from the reproach often leveled at legislative history—that it is enigmatic,"¹⁹⁴ he apparently believes it unnecessary to consider even the most obviously relevant events just beyond the halls of Congress in Washington in the winter of 1865-1866. Yet these events are crucial to an understanding of congressional intent.

B. Congress and the President

It is no surprise that the congressional response to the condition of the emancipated slaves was paternalistic. The federal government would protect basic rights; every right must have a remedy. If necessary, Congress would intervene to afford redress. In the spring of 1866, Congress hoped that President Johnson would cooperate and that enforcement in the federal courts would suffice. Within a year, the President urged Southern states not to ratify the fourteenth

well enough what 'privileges or immunities' comprised. He stated, 'we may gather some intimation of what *probably will be the opinion of the judiciary* by referring to . . . *Corfield v. Coryell*.'" P. 103 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (remarks of Sen. Howard)) (emphasis added).

Nevertheless, Berger summarizes: "So far as I could find [legislative] history affords no basis for reading into § 5 the judicial power of enforcement it so plainly withheld." P. 229. That may well be because nobody else was aware that judicial power was withheld, plainly or otherwise, and because the men of the 39th Congress tended to invoke rather than to question *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the concept of judicial review.

Berger says that "[a] reasoned argument for a judicial power of enforcement of the Fourteenth Amendment—apart from that derived from the grant in the Civil Rights Act of 1866, which Congress is free to withdraw—has yet to be made." P. 229. The reason is probably that most people still accept *Marbury*. Even if Berger is correct that section 5 confers exclusive power on Congress, he has not eliminated the fact of judicial enforcement of the fourteenth amendment unless he means to challenge *Marbury*. If he is merely discovering Congress' article III power to control the jurisdiction of federal courts, his point is even narrower and more peculiar. Berger does note that these questions deserve further study. *Id.*

Curiously, Berger also appears to approve, almost as a throwaway, see p. 226, the important argument made by Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1357 (1964). Frantz argued that Congress could reach private action by individuals more readily than it could reach state action. Berger's view of this theory is altogether murky; but if he accepts it, traditional state action restrictions would be turned upside down.

¹⁹⁴ P. 6.

amendment; reports of Southern mob rule reached Washington repeatedly; and Congress legislated military reconstruction. It is difficult for us today, with our accumulated baggage of laissez-faire thinking, to discern the political theory of 1866, particularly since the Civil War so abruptly startled and transformed a society in which government had been mainly "anarchy with a constable."¹⁹⁵ Federalism and the power of the federal government would never be the same.

Berger entirely ignores the irreparable split between the Executive and the leaders of Congress. But in struggling to comprehend the thought of the period, the strained relationship between the 39th Congress and President Johnson is especially important, and an understanding of this relationship helps to explain how Congress responded in the Civil Rights Act of 1866 to the new conditions it confronted.

President Johnson's veto of the Freedmen's Bureau Bill on February 19 is a useful starting point, though much had gone before.¹⁹⁶ The nation was still uncertain about the Reconstruction policies of this obscure successor to Lincoln. His unexpected veto, accompanied by a message refusing to consider the national aspect of the problem of protecting the freedmen, had "climacteric effects"¹⁹⁷ upon Congress. The Senate failed by a single vote to reach the two-thirds needed to override.¹⁹⁸ Two additional unofficial blunders by President Johnson in February contributed to the mobilization of the Republican leadership, played directly into the hands of the more Radical Republicans, and led to the successful override of Johnson's veto of the Civil Rights Act in April.

The first mistake occurred when a delegation of blacks led by Frederick Douglass met with Johnson with the hope of convincing him to support black suffrage rather than to appease the South. By all

¹⁹⁵ H. HYMAN, *supra* note 84, at 69; see P. PALUDAN, *supra* note 17, at 25.

¹⁹⁶ See note 31 *supra*. Fawn Brodie describes the veto as "probably the most foolish mistake" of Andrew Johnson's career. F. BRODIE, THADDEUS STEVENS, SCOURGE OF THE SOUTH 252 (1959).

¹⁹⁷ W. BROCK, *supra* note 34, at 106. Not only the Radicals and Senator Trumbull, who believed he had been assured presidential support, were surprised. "There was a pained and angry response from all parts of the North." E. MCKITRICK, *supra* note 34, at 290. The most startling aspect of the veto of the Freedmen's Bureau Bill was the President's argument that the bill was not valid in the absence of Southern representation in Congress. This position directly challenged congressional prerogatives. Even historians most sympathetic with Johnson identify the Freedmen's Bureau Bill veto as the point at which Johnson "formally opened the breach with Congress which was to be his undoing." W. DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC 60 (1907).

¹⁹⁸ See W. BROCK, *supra* note 34, at 106.

accounts, the President was rude and unsympathetic; according to his personal secretary, he was outlandishly bigoted.¹⁹⁹ Frederick Douglass decided to take his case to the nation. His tightly written rebuttal made public for the first time the new President's position on race.²⁰⁰ Leading Republicans in Congress were not pleased.

Three days after his veto of the Freedmen's Bill, President Johnson made abundantly clear his lack of interest in working with Congress on Reconstruction. A group of Democrats returned from a celebration of Washington's Birthday at Grover's Theater, which included resolutions that endorsed Johnson's veto of the Freedmen's Bill and declared that "the grand old declaration that 'all men are created equal' was never intended [to include non-whites]." ²⁰¹ They gave the President a traditional Washington's Birthday serenade. Johnson responded with a harangue nearly two hours long, in which he declared that there were traitors in the North as bad, if not worse, than any in the South. When asked, he named names—Charles Sumner, Thaddeus Stevens, and Wendell Phillips—and hinted that they were behind Lincoln's assassination.²⁰²

¹⁹⁹ A report of the interview is available in E. MCPHERSON, *A POLITICAL MANUAL FOR 1866 AND 1867*, at 52-55 (1867). McPherson was Thaddeus Stevens' protege and Clerk of the House during the 39th Congress, and his *Manual* reprints most of the critical votes, speeches, and messages for the period. President Johnson's interview with the black leaders is illuminating. He revealed his fears about the fate of poor whites, faced with competition from blacks, and he advocated colonization instead of granting rights to freedmen. The blacks reiterated a common attitude of black leaders of the period that "invidious political or legal distinctions, on account of color merely . . . [are] inconsistent with our own self-respect." J. FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 56 (1961).

President Johnson's rude and racist response to the black delegation was first noted in L. COX & J. COX, *supra* note 34, at 163. A letter from Johnson's private secretary reported that after the "darkey delegation" had left his office, "the President uttered the following terse Saxon: 'Those d—d sons of b—s thought they had me in a trap! I know that d—d Douglass; he's just like any nigger, and he would sooner cut a white man's throat than not.'" Letter from P. Ripley to M. Marble (February 8, 1866), *quoted in* L. COX & J. COX, *supra*, at 163.

The racist attitude was not out of character for Andrew Johnson. Analyzing Johnson's public speeches, George Sinkler states: "One finds more intemperate racial utterances and Negrophobic epithets expressed in the speeches of Andrew Johnson than in the writings of the other nine Presidents [from Lincoln to T. Roosevelt] combined." G. SINKLER, *THE RACIAL ATTITUDES OF AMERICAN PRESIDENTS FROM ABRAHAM LINCOLN TO THEODORE ROOSEVELT* 115 (1971).

²⁰⁰ By Frederick Douglass' own account, this meeting with President Johnson was the turning point: "What was said on that occasion brought the whole question virtually before the American people. Until that interview the country was not fully aware of the intentions and policy of President Johnson on the subject of reconstruction, especially in respect of the newly emancipated class of the South." F. DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS, WRITTEN BY HIMSELF* 382 (1892). For Douglass' eloquent statement in response to Johnson, see *id.* at 383-85.

²⁰¹ J. MCPHERSON, *supra* note 41, at 348.

²⁰² E. MCKITTRICK, *supra* note 34, at 293-94. Other reports, in complete agreement as to the thrust of the speech despite slight differences in exact quotation, may be found in W. BROCK,

Phillips may still have been regarded by many as an outside agitator.²⁰³ But Stevens was the unquestioned leader of the House,²⁰⁴ and Sumner was not an ineffective outcast,²⁰⁵ as Berger

supra note 34, at 110-11; J. MCPHERSON, *supra* note 41, at 348-49; J. RANDALL & D. DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 578 (1961). The *National Intelligencer* report of the speech is reprinted in full in E. MCPHERSON, *supra* note 199, at 58-63.

²⁰³ By 1865, enough people had joined with Phillips in what was once a lonely crusade that "at a time when emancipation was the order of the day he had become the outstanding abolitionist in the country, the field agent of the Radicals in Congress." R. HOFSTADTER, *supra* note 61, at 152. Phillips had been feted in Washington in 1862, where he dined with the Speaker of the House and had an audience with Lincoln. *Id.* See generally *id.* at 135-61; I. BARTLETT, *WENDELL PHILLIPS* (1961).

²⁰⁴ See W. BROCK, *supra* note 34, at 80-81; Bickel, *supra* note 169, at 29 n.61. The Dunning-Kendrick-Bowers school of historians portrays Stevens as a wild-eyed avenging devil, motivated solely by politics and revenge. More recent historiography perceives Stevens as a tragic figure dedicated to the protection of blacks, even unto giving them land, though he may have been motivated in part by less idealistic notions, which may have included protection of white labor and a desire to keep blacks happily free and living in the South. See generally F. BRODIE, *supra* note 196.

²⁰⁵ Sumner's complex role as symbol and conscience of the Senate is masterfully presented in David Donald's two-volume biography, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* (1960) [hereinafter *COMING OF THE CIVIL WAR*] and *RIGHTS OF MAN*, *supra* note 51. It is sloppy to take a single quotation from Donald's work out of context to prove Sumner's lack of influence. It is peculiar to take Sumner's recollection of his reaction to first seeing slaves as typifying his—or others'—views on race in 1866. Berger does both, pp. 10-11 & n.34, and seems unaware that Donald paints quite a different picture.

Berger stresses Sumner's isolation in the Senate to prove that the Senate intended a much more conservative program than Sumner proposed. There is something to the point, but it cannot rest on a quotation from Donald: "More and more Senators came to distrust [Sumner], when they did not detest him," D. DONALD, *RIGHTS OF MAN*, *supra*, at 248, quoted at p. 236. Later in his discussion, however, Donald specifically notes that "Andrew Johnson [by his blunders] saved Sumner from political ostracism." *Id.* at 254. Furthermore, Donald states the theme of his second volume to be how Sumner "shrewdly balanced . . . political forces" to "hold his powerful place in the Senate during a critical period in our history" and "to keep his position in the Senate, and his hold on public opinion, long after most of the early Republican leaders had dropped out of sight." *Preface* to *id.* at ix.

Foner notes that in an age when politics was a national form of entertainment, as well as heartfelt commitment, Sumner "had an enormous impact on northern public opinion." E. FONER, *supra* note 41, at 145. Brock terms Sumner "a heroic figure" and "the spokesman of a movement which had transcended politics." W. BROCK, *supra* note 34, at 78-79. Harold Hyman sums up Sumner's role in Congress as follows: "Almost all congressmen were awed by . . . Senator Sumner's undimmed passions for good causes and unequaled knowledge of classical history." H. HYMAN, *supra* note 84, at 302.

Berger apparently would have it that Sumner was not influential because he was "a leading spokesman for extreme abolitionist views," pp. 10-11, since Berger believes abolitionist views were not influential. But the "extreme abolitionists" in the Garrison-Phillips wing renounced politics, as Sumner most assuredly did not. See text accompanying notes 62-71 *supra*. It would have been more accurate to say that Sumner was a leading spokesman for Radical Republican views.

But Berger's exaggeration in this instance pales beside his attempt to show that Sumner, though an extreme abolitionist, was racist. Berger tells us that in 1834 Sumner wrote that he

contends.²⁰⁶ Recent interpretations of Andrew Johnson indicate that he sought to engineer a realignment of the parties, to combine the majority of Republicans with Democrats into a new "Unionist" party and thereby to isolate the Radicals.²⁰⁷ The effect of Johnson's harangue—"one of the most remarkable public speeches ever uttered by an American president"²⁰⁸—was profound. Northerners were "stunned";²⁰⁹ Johnson's friends, "appalled";²¹⁰ and Republicans both mortified and fearful that Johnson had "gone over to the opposition."²¹¹ Eight states passed resolutions criticizing the President.²¹² There is no doubt that "[m]any moderate Republicans turned against the president" because of the speech,²¹³ and that Stevens and other Radicals gained support as more moderate congressmen were forced into their camp.

was appalled by his first sight of slaves. Pp. 10-11. This fact, together with Tocqueville's observations in 1831-1832 and the 1837 murder of Lovejoy, apparently is meant to prove that the 39th Congress was deeply racist in 1866. *See id.*

Berger's unwillingness to perceive that men, as well as thought and language, may change over time is further illustrated by the use he makes of another statement by Sumner. He quotes something Sumner said in 1853 to a Massachusetts convention concerning equal representation and uses it as "hard evidence," p. 74, of the meaning of congressional debate over a decade later. Donald, however, makes abundantly clear that Sumner transcended the views of slavery he may have held as a 26-year-old. Donald also indicates that even one as unyielding as Sumner was much of the time could and did change his mind during the rapid transformations in the antislavery movement and in the country generally in the 15 years that preceded the 39th Congress. *See generally* D. DONALD, *COMING OF THE CIVIL WAR*, *supra*. In his desire to prove a point, Berger altogether misses David Donald's central theme about Sumner:

Sumner had a comprehensive and systematic political philosophy, which was based on the simple premise that all men are created equal. He felt that the role of government was to secure to all its citizens equal rights, without regard to race or color or sex or national origin or religion.

Preface to D. DONALD, *RIGHTS OF MAN*, *supra*, at viii.

²⁰⁶ Pp. 235-36.

²⁰⁷ This interpretation is a central theme of L. COX & J. COX, *supra* note 34. The Coxes state, for example, that "in a stubborn pursuit of total political victory, President Johnson destroyed all possibility of a moderate, constructive reconstruction of the Union." *Id.* at 32. Historians are in general accord on the point. *See, e.g.*, D. DONALD, *RIGHTS OF MAN*, *supra* note 51, at 259-60; H. TREFOUSSE, *supra* note 46, at 347. H.K. Beale, a follower of Dunning, regards the reconstituting of the political parties as a good idea that Johnson should have pursued more vigorously. H.K. BEALE, *supra* note 106, at 113-39.

²⁰⁸ J. MCPHERSON, *supra* note 41, at 348.

²⁰⁹ W. BROCK, *supra* note 34, at 111.

²¹⁰ J. MCPHERSON, *supra* note 41, at 349; *see* E. MCKITRICK, *supra* note 34, at 292.

²¹¹ L. COX & J. COX, *supra* note 34, at 119.

²¹² J. MCPHERSON, *supra* note 41, at 349.

²¹³ *Id.* E. MCKITRICK, *supra* note 34, sums up reaction to the speech: "[H]e had accorded official recognition to a split in the government." *Id.* at 295. William Lloyd Garrison quickly called for impeachment based on the speech. J. MCPHERSON, *supra* note 41, at 349.

This political context helps explain how "Johnson made Radical leadership the only alternative to congressional surrender."²¹⁴ Johnson's next bombshell came with his surprise veto of the Civil Rights Bill, although its Moderate sponsor, Senator Lyman Trumbull of Illinois, believed he had been assured presidential support of the bill. After this second veto, even Sumner, "forgetting for a moment his stately dignity," was "'well nigh ubiquitous'"²¹⁵ as he sought votes to override. Historians agree that for most Republicans the veto of the Civil Rights Act was "the last straw."²¹⁶ The veto caused "a virtually irreparable breach between the President and the party that elected him";²¹⁷ and it was followed by the first override of a presidential veto on any major political issue in the history of the Congress. The override was greeted with jubilation in the galleries and on the floor.²¹⁸ Berger mentions nothing of this political background

²¹⁴ W. BROCK, *supra* note 34, at 121.

²¹⁵ D. DONALD, *RIGHTS OF MAN*, *supra* note 51, at 260 (quoting N.Y. Herald, Mar. 28, 1866).

²¹⁶ J. MCPHERSON, *supra* note 41, at 350. President Johnson's disastrous "Swing Round the Circle" in the late summer of 1866, and the Republican landslide in the fall congressional elections, when combined with reports of new Southern outrages, help explain the further radicalization of the Reconstruction plans of Congress. See generally K. STAMPP, *supra* note 31, at 113-22, 142-54.

²¹⁷ J. MCPHERSON, *supra* note 41, at 350. Trumbull emphasized his dismay at the veto, since he had "just expectations" of presidential approval. CONG. GLOBE, 39th Cong., 1st Sess. 1755 (1866). In vetoing the Civil Rights Act, Johnson ignored the wishes of all but one of his cabinet officers and of moderates from all over the country. J. RANDALL & D. DONALD, *supra* note 202, at 579. Finally, Johnson's veto message directly assaulted the main theme of the supporters of the Act: "[A] perfect equality of the white and black races is attempted to be fixed by Federal law, in every State of the Union, over the vast field of State jurisdiction covered by these enumerated rights." CONG. GLOBE, 39th Cong., 1st Sess. 1679-80 (1866). Johnson maintained that Congress could not act until Southern representatives were once again seated. See W. BROCK, *supra* note 34, at 106.

Trumbull's conscientious, point-by-point response, CONG. GLOBE, 39th Cong., 1st Sess. 1755-61 (1866), does not dispute the President about Congress' willingness to override state jurisdiction when necessary to provide perfect equality in the enumerated rights. Berger ignores the vital point of Trumbull's speech. Trumbull asserted that "[a]lliance and protection are reciprocal rights"; that "American citizenship would be [of] little worth if it did not carry protection with it"; and that this new protection, which the Civil Rights Act extended to any American citizen—"no matter where he may be"—was protection of the "inalienable rights" in the Declaration of Independence, "these inherent, fundamental rights which belong to free citizens or free men in all countries." *Id.* at 1757.

²¹⁸ W. BROCK, *supra* note 34, at 115. Brock reports the importance of the event to Republicans and notes that "there was special gratification in feeling that [the override] had not been done to carry some matter of material interest, such as a tariff, but in the cause of disinterested justice." *Id.* F. BRODIE, *supra* note 196, quotes an exuberant letter to the *Nation* reporting that when the override scraped through by a bare two-thirds vote in the Senate, "nearly the whole Senate and auditory were carried off their feet and joined in a tumultuous outburst of cheering such as was never heard within those walls before." *Id.* at 264.

to the very Civil Rights Act he deems central to—and conclusive of—the meaning of the fourteenth amendment.

The political context does much to explain the language, and the votes, of the 39th Congress. It aids understanding of the impact of the Civil War, which compelled new thinking about the appropriate role of government. President Johnson's inability to adjust, and his blunders, had much to do with the willingness of even Moderate congressmen to depart from old notions of state sovereignty.

In Berger's defense, it should be noted that even as astute a scholar as Alexander Bickel similarly focused entirely on the legislative record as disclosed in the *Congressional Globe*.²¹⁹ Bickel, however, had the insight to advise Justice Frankfurter that there was little regard for precise language in the 39th Congress, which was "not notable for the presence in its membership of very many brilliant men. A blunderbuss was simply aimed in the direction of existing evils in the South on which all eyes were fixed."²²⁰

Berger appears unable to live with such uncertainty.

C. Early Judicial Interpretations

The first decisions construing the Civil Rights Act of 1866 are an obvious place to look for additional contemporaneous explanation for

The intensity of interest in the override is also demonstrated by the bitter technical maneuvering, and the language surrounding it, in the questionable but successful effort to unseat Senator Stockton. After an initial tie vote, and debate over the interesting problem whether Stockton could vote on the issue of his own credentials, Senator Benjamin Wade of Ohio offered thanks to God for keeping Senator Dixon of Connecticut so ill "that he cannot be here to uphold the dictation of a despot." CONG. GLOBE, 39th Cong., 1st Sess. 1786 (1866).

Berger's lack of awareness of this political context stands out in his argumentative use of a remark by Senator Stewart of Nevada. Senator Stewart said he would support the fourteenth amendment, though it did not directly confer suffrage (which he favored), because Congress could adopt other means by a two-thirds vote. *Id.* at 2964. Berger states that Stewart "plainly" was referring to the prospect of a further amendment and not to a later statute. Pp. 97, 106. A far more plausible interpretation, given the split between Congress and the President, is that Stewart was referring to the two-thirds vote necessary to override anticipated presidential vetoes of Reconstruction legislation.

²¹⁹ In an influential article updating his famous memorandum as a law clerk to Justice Frankfurter, Bickel invoked Frankfurter's assertion that pursuit of historical meaning is "not a mechanical exercise but a function of statecraft." Bickel, *supra* note 169, at 5 (quoting F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 76 (1938)). But one cannot rely as exclusively as Bickel did on the legislative debate, *id.* at 6-7, for it is too narrow a focus. Unlike Berger, however, Bickel was willing to concede that history may be inconclusive. That concession was the chief contribution of Bickel's memorandum to Justice Frankfurter, which in turn led to Chief Justice Warren's famous remark that the legislative history of the fourteenth amendment was "inconclusive." *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954).

²²⁰ Letter from Alexander Bickel to Justice Frankfurter (1953), quoted in R. KLUGER, *supra* note 169, at 654.

and interpretation of the Act's crucial phrases. These decisions involved pronouncements by Supreme Court Justices, on circuit, in the two years before the Act was "constitutionalized" by the fourteenth amendment. Berger fails to mention these decisions.²²¹

The Act was first construed in *United States v. Rhodes*,²²² in which the court held that a black woman had a right to testify against a gang of white men who had forcibly entered her home.²²³ Justice Swayne's opinion unequivocally recognized the revolutionary nature of the thirteenth amendment and of the 1866 Act, noting that the thirteenth amendment "trenches directly upon the power of the states and of the people of the states. It is the first and only instance of a change of this character in the organic law."²²⁴ The amendment was an "act of great national grace"²²⁵ which would "continue to perform its function throughout the expanding domain of the nation, without limit of time or space" to afford "protection over every one."²²⁶ This language plainly indicates neither attachment to state sovereignty, nor a sense of limitation on federal power imposed by the tenth amendment.

State sovereignty was also not a concern of Chief Justice Chase in an 1867 lower federal court decision, *In re Turner*,²²⁷ which granted a federal writ of habeas corpus to a former slave who had been apprenticed to her former owner for training in "the art or calling of a house servant."²²⁸ Chase dealt with a "private" contractual arrangement, but he found that the variance in the conditions of white and black apprentices violated the "full and equal benefit" clause of section 1 of the Civil Rights Act of 1866.²²⁹

²²¹ Berger also does not mention contemporaneous state court decisions, which similarly gave a broad construction to the rights of blacks. See H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 47-54 (1908). Berger dismisses Flack, who found that Congress intended broad guarantees of civil rights, as "a devotee of broad construction." P. 23. This confuses the messenger with the message. In fact, Flack bemoaned what his research disclosed, decried Republican irrationality, and maintained that Republicans incorporated broad federal power "in such a way that the people would not understand the great changes intended to be wrought in the fundamental law of the land." H. FLACK, *supra*, at 69; see *id.* at 19, 30-31.

²²² 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

²²³ *Id.* at 786.

²²⁴ *Id.* at 788.

²²⁵ *Id.* at 794.

²²⁶ *Id.* at 793. Justice Swayne noted that the Act protected whites, but he believed that there would be few occasions for whites to invoke its protection. See *id.* at 786, 787.

²²⁷ 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

²²⁸ *Id.* at 338.

²²⁹ *Id.* at 339. A fascinating parallel decision four years later by Circuit Judge Woods was based primarily on the fourteenth amendment, which had been ratified in the interim. His interpretation of federal power to protect fundamental rights denied by state action or "omission to protect" was overlooked by Berger and other commentators. In *United States v. Hall*, 26 F.

The entire Supreme Court considered the Act for the first time in *Blyew v. United States*.²³⁰ The Court, anything but enthusiastic about congressional Reconstruction, both anticipated and helped to lead the national retrenchment from civil rights.²³¹ That retrenchment culminated in the Court's declaration in 1883 in the *Civil Rights Cases*²³² that it was time the black man "cease[d] to be the special favorite of the laws."²³³ Yet, even the Court's early narrow construction in *Blyew* recognized broad congressional intent. In that case a black woman had been murdered. The Court held that the Act did not give the federal courts jurisdiction over the murder indictment²³⁴ because the victim's rights would not be "affected" by a verdict against the defendants.²³⁵ But Justice Strong's majority opinion did note that the 1866 Civil Rights Act was intended to remedy such evils as "prejudices . . . which naturally affected the administration of justice in the State courts," and that the Act was meant to reach laws which inflicted "different . . . and often severer" punishments upon blacks.²³⁶ Justice Bradley, in dissent, viewed the Act as broader still and discussed the radical change worked in the condition of the

Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282), Judge Woods, who was to become in 1880 the first Justice from the South since the Civil War, wrote:

[C]ongress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against *unfriendly or insufficient* state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, *but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws . . .* [which] includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws.

Id. at 81 (emphasis added). He added that "to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, *as well against state legislation as state inaction, or incompetency*, the amendment gives congress the power to enforce its provisions by appropriate legislation." *Id.* (emphasis added). Justice Woods overruled a demurrer to an indictment charging a private conspiracy to deprive United States citizens (not identified by race) of their first amendment rights, *id.* at 82, which he held to be among the rights of "citizens of all free states," *id.* at 81; *accord*, *United States v. Mall*, 26 F. Cas. 1147 (C.C.S.D. Ala. 1871) (No. 15,712).

²³⁰ 80 U.S. (13 Wall.) 581 (1871).

²³¹ That natural law was not entirely alien to the Supreme Court in 1866 was obvious, for example, in dicta in the unanimous decision in the License Tax Cases, 72 U.S. (5 Wall.) 462, 469 (1866) ("There are, undoubtedly, fundamental principles of morality and justice which no legislature is at liberty to disregard . . .").

²³² 109 U.S. 3 (1883).

²³³ *Id.* at 25.

²³⁴ 80 U.S. (13 Wall.) at 590.

²³⁵ *Id.* at 591, 594.

²³⁶ *Id.* at 593. The majority did not doubt the constitutionality of the Act, and Justice Strong specifically denied any intention to limit it. *Id.*

United States by the thirteenth amendment.²³⁷ In fact, Justice Bradley's interpretation²³⁸ directly foreshadowed the broad interpretation of "badges and incidents of slavery" adopted by the Court three-quarters of a century later in *Jones v. Alfred H. Mayer Co.*²³⁹ Bradley argued that the constitutional abolition of slavery meant that Congress could, and in the Civil Rights Act actually did, "place persons of African descent on an equality of rights and privileges with other citizens of the United States."²⁴⁰

The first judicial construction of the Civil Rights Act of 1866 that Berger discusses is that in the *Slaughter-House Cases*²⁴¹ in 1873. To his credit, Berger criticizes the logic of Justice Miller's opinion for the majority, which eviscerated the privileges and immunities clause of the fourteenth amendment.²⁴² But Berger does not note several important comments made by Miller in the course of his opinion. Miller argued that the history "fresh within the memory of us all" inescapably indicated that the thirteenth and fourteenth amendments were based on "the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; *additional powers to the Federal government; additional restraints upon those of the States.*"²⁴³

During the "Thermidor" stage of Reconstruction, therefore, even the *Slaughter-House Cases* majority, committed as it was to narrowing the Civil War amendments to the point of redundancy, explicitly recognized that these amendments contained additional guarantees of human rights. These guarantees were secured by the addition of power to the federal government at the expense of the states. A new federalism, which interposed the federal courts between the states and the people, was reflected repeatedly in the extensive increase in lower federal court jurisdiction in the decade following the Civil War.²⁴⁴ As Justice Benjamin Curtis reminded in his eulogy for Chief Justice Taney, "Let it be remembered . . . that questions of jurisdic-

²³⁷ *Id.* at 595-98 (Bradley, J., dissenting).

²³⁸ It has been suggested that Justice Bradley's views changed considerably between his initial interpretation and his majority opinion in the Civil Rights Cases, 109 U.S. 3, 20-25 (1883). See Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases*, 25 RUTGERS L. REV. 552 (1971).

²³⁹ 392 U.S. 409, 439-44 (1968).

²⁴⁰ 80 U.S. (13 Wall.) at 595 (Bradley, J., dissenting).

²⁴¹ 83 U.S. (16 Wall.) 36 (1873).

²⁴² Pp. 37-38.

²⁴³ 83 U.S. (16 Wall.) at 67-68 (emphasis added).

²⁴⁴ See note 148 *supra*.

tion were questions of power as between the United States and the several States.'"²⁴⁵

IV

PROTECTION AND PATERNALISM

Since I have indicated why I think that Raoul Berger is so often so wrong, I think it appropriate to offer my best guess as to what the 39th Congress intended. I posit the following hypothesis concerning the elusive legal ideology of 1866.

Before the full impact of Darwin and Mill, Americans believed that government had a duty to protect basic civil rights. Natural rights, particularly as defined in the Declaration of Independence, were vitally important. The men of the 39th Congress could attempt as legislators to eliminate some of the earlier dissonance produced by faith in the Union and the unacceptable but clear command of the Fugitive Slave Law to remit slaves, which conflicted with the moral outrage many felt toward slavery and its continuing effects. The duty of government toward its citizens—particularly those newly freed—was a central, though not a carefully defined, belief. Government had a paternalistic duty to protect all citizens equally.

For a brief period after the Civil War, it was thought that federal power would perform that duty as long as the states did not. In the spring of 1866, Congress hoped that access to federal courts would suffice; within a year, Congress called for military reconstruction, the most extreme exercise of federal power. The Military Reconstruction Act of March 2, 1867,²⁴⁶ declared that all the ex-rebel areas but Tennessee—which had already ratified the fourteenth amendment—had no legal state governments and were failing to protect life and property. Accordingly, the South was divided into military districts, and black suffrage was made a precondition for readmission of the Southern states to the Union. The legislature that enacted this measure was a far cry from the war-weary Congress Berger portrays as lacking sufficient energy to protect civil rights²⁴⁷ and as committed to states' rights and the tenth amendment.²⁴⁸

²⁴⁵ H. HYMAN, *supra* note 84, at 456 (quoting B. CURTIS, NOTICE OF THE DEATH OF CHIEF JUSTICE TANEY 9 (1864)). See generally S. KUTLER, *supra* note 148, at 143-60.

²⁴⁶ Ch. 152, 14 Stat. 428 (1867).

²⁴⁷ See p. 14.

²⁴⁸ Pp. 154-55.

If my hypothesis is correct, the language of the Civil Rights Act of 1866 represents a major departure from notions of state sovereignty and limited government that had dominated federal legislation prior to the Civil War. The men of the 39th Congress meant to assure the fruits of victory. They no longer revered state sovereignty, a concept they held responsible for the recent conflagration. They might respect states' rights, but not to the point of leaving the civil rights of freedmen to the mercies of the unreconstructed Southern states. The thirteenth amendment and the political reality of 1866 afforded an opportunity to implement basic rights for which the antislavery movement had fought, and which many congressmen discerned in the Declaration of Independence and in natural law. The blood of the war could scourge slavery and the Slave Power. A chance to move the nation closer to its exemplary destiny was at hand.

One need not agree fully with Arthur Schlesinger, Jr., that "the Civil War was a climactic test," and that "Northern victory . . . strengthened the conviction of providential appointment."²⁴⁹ Senator Trumbull's statement that the Civil Rights Act of 1866 "in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property,"²⁵⁰ is not, as Berger would have it,²⁵¹ a clear-cut statement of a deep-seated attachment to state sovereignty.²⁵² Trumbull's words are ambiguous at best. In fact, they are subject to a more likely interpretation which is nearly the opposite of that given by Berger. In 1866, federal government intervention might have been considered appropriate when necessary to protect basic civil rights. States' rights would end when a state failed to protect all citizens alike in personal and property rights. The duty of government to afford the paternalism of protection, already a major strand in American thought, now shifted from the local and state level to the reunited nation.

The laissez-faire theories of William Graham Sumner and Stephen J. Field had not yet captured the public's conception of basic rights. "The materialization of community value standards,"²⁵³ which

²⁴⁹ Schlesinger, *America: Experiment or Destiny?*, 82 AM. HIST. REV. 505, 516 (1977). Schlesinger views the impact of the Civil War as a critical advance for American messianism at the expense of realism. He quotes Edward Stowe as an example of post-Civil War thought: "Now that God has smitten slavery unto death, . . . he has opened the way for the redemption and sanctification of our whole social system." *Id.*

²⁵⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1761 (1866).

²⁵¹ See pp. 62, 103.

²⁵² See note 111 *supra*.

²⁵³ R. McCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE 20 (1951).

made the 1870's "a turning point in American democratic thinking,"²⁵⁴ did not yet prevail. Instead, government performed an active enabling function. To use Willard Hurst's famous phrase, "release of energy"²⁵⁵ was still the foremost role for government. The 39th Congress was aware that it was constitution-making. As Professor Hurst states, "Where legal regulation or compulsion might promote the greater release of individual or group energies, we had no hesitancy in making affirmative use of law."²⁵⁶ Hurst's Pike Creek settlers ended their own little constitution with the solemn pledge "'to render each other our mutual assistance, in the protection of our just rights.'"²⁵⁷ That sentiment is familiar because of its echo of the Declaration of Independence. The Declaration, after all, theorized that governments are instituted to "secure" inalienable rights. In 1866, the federal legislature would make amends for past wrongs, and its amendments would lead the way toward the bright, unbounded future.²⁵⁸

The mixture of paternalism, perfectibility, and individualism of 1866 was a manifestation of the unresolved tension that dominated much of nineteenth-century thought.²⁵⁹ The dilemma—paternalism or individualism—which confronted even John Stuart Mill,²⁶⁰ underscores the difficulty of deciding what or who was racist in 1866 when viewed through the clouded prism of modern definitions of racism. The power of mid-nineteenth century faith in paternalism is indicated

²⁵⁴ *Id.* at 18.

²⁵⁵ J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 3-32 (1956).

²⁵⁶ *Id.* at 7.

²⁵⁷ *Id.* at 4.

²⁵⁸ While it is beyond the scope of this essay, a careful comparison with contemporaneous political activity in England deserves further study. Both Disraeli's Tory humanitarianism and Gladstone's Liberalism entailed paternalistic governmental intervention. *See generally* R.W. DAVIS, *DISRAELI* 156-81 (1976); P. SMITH, *DISRAELIAN CONSERVATISM AND SOCIAL REFORM* 222-23 (1967); *see also* L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* 98-113 (1955).

²⁵⁹ *See, e.g.*, M. ROGIN, *FATHERS & CHILDREN* 165-205 (1975); D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1971). Rogin and Rothman join other historians in noting the conservative impulse of reform movements in the Jacksonian era. For many Republicans, glorification of the revolutionary fathers continued in, and even dominated over, their devotion to free labor and perfectibility in the postwar future. *See generally* W. BROCK, *supra* note 34, at 5-6, 62-67, 271-73.

²⁶⁰ Mill would apply his utilitarian principle only "to human beings in the maturity of their faculties." J.S. MILL, *ON LIBERTY* 9 (R. McCallum ed. 1947). Mill continued: "Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury." *Id.* Mill then stressed that a condition precedent for the principle of liberty is to be "capable of being improved by free and equal discussion" and to have arrived at "the maturity of [one's] faculties." *Id.*

somewhat, for example, by an important opinion written by Justice Stephen J. Field during his first Term on the California Supreme Court, which was before he "got" Darwinian religion. Justice Field expressed effusive deference to the legislature in his dissenting opinion in a case that invalidated a Sunday closing law.²⁶¹ Field's identification of the source of authority for the legislative action is still more suprising: "Authority for the enactment I find in the great object of all government, which is protection."²⁶² Further, he wrote, "to protect labor is the highest office of our laws."²⁶³ Since the nation's founding, government had been perceived as both an enabler and a protector. Equal opportunity to benefit from the fruits of one's labor was a central tenet.²⁶⁴

This fundamental duty of government to protect and to afford redress appears starkly as early as 1803 in Chief Justice Marshall's great essay on government in *Marbury v. Madison*.²⁶⁵ Marshall wrote: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."²⁶⁶ The lawyers and politicians who constituted the 39th Congress perched on a great divide in American intellectual history. The advances made by instrumentalism, affording legal protec-

²⁶¹ *Ex parte Newman*, 9 Cal. 502, 521 (1858) (Field, J., dissenting). In fact, Field sounded very much like Chief Justice Warren in his extreme deference to legislative authority when the Supreme Court found Sunday closing laws constitutional in *McGowan v. Maryland*, 366 U.S. 420, 444-49 (1961).

²⁶² *Ex parte Newman*, 9 Cal. at 521.

²⁶³ *Id.*

²⁶⁴ A constant refrain in the legislative debates in the 39th Congress is that freedmen had to be protected to guarantee them the fruits of their labor. Foner discusses the central place this ideology had in Republican thought. See E. FONER, *supra* note 41, at 11-39, 308-17. He describes the optimistic Republican belief in social mobility, in human perfectibility, and in American destiny. "Republicans therefore accepted the growth of industry as one part of the nation's economic development, and in the 1850's they took a broad view of the power of the federal government to aid in economic growth, supporting such measures as the tariff, homesteads, and internal improvements." *Id.* at 36.

Such beliefs were basic to the middle-of-the-Republican-road campaigning done by Lincoln. See R. HOFSTADTER, *supra* note 61, at 102-06. See generally Nelson, *supra* note 54, at 538-39.

²⁶⁵ 5 U.S. (1 Cranch) 137 (1803).

²⁶⁶ *Id.* at 163. Even Thomas Jefferson, in his Inaugural Address, asserted that the will of the majority must prevail, but that the majority is subject to restraint for the reason "that the Minority possess their equal rights, which equal laws must protect, & to violate would be oppression." 8 T. JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 2 (Ford ed. 1897) (emphasis added). See B. WRIGHT, *supra* note 54, at 157-58. And Andrew Jackson waxed rhapsodic about equal protection of the law in his 1832 bank veto message:

In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law. . . . If [government]

tion to privileged competitors in the great Darwinian jungle, were about to be frozen in formalism.²⁶⁷ The Civil War had unified the country in ways other than the military victory. A short-lived federal income tax was but a token of the breadth of new involvement by the federal government in the economy. The victory of Northern machines and munitions over Confederate esprit symbolized the revolution in industrialization, finance, and communications that surrounded the 39th Congress. The outbreak and the ferocity of the Civil War stunned the North; the time of rebuilding and reconstructing called for additional governmental involvement.

Furthermore, the war eliminated the possibility of thinking of blacks totally as non-persons, particularly because many of them had demonstrated their allegiance under arms and now had standing to claim the protection generally assumed to be the reciprocal obligation of government. But were the newly freed blacks capable of full citizenship? Would they come north to compete with white labor? Depending on background, sympathy with the antislavery cause, and the degree of racism in his constituency, a senator or congressman might or might not have a theory to answer these problems. It seems that even "Honest Abe" Lincoln gave very different answers in the northern and southern parts of Illinois and at the beginning and end of the Civil War.²⁶⁸ But there can be no doubt that federal power had been used in an unprecedented way to protect individuals through the thirteenth amendment and the Civil Rights Act of 1866.

CONCLUSION

The constant refrain of a governmental duty to protect, sounded throughout the debates on the Civil Rights Act of 1866, had different meanings for different legislators. To many it meant federal assurance of a remedy if the states failed—through either action or inaction—to protect the freedmen equally in the basic rights listed in the Act. Berger is probably right in keying this protection to the law in the

would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing.

8 CONG. DEB. app. 79 (1832) (emphasis added).

²⁶⁷ See M. HORWITZ, *supra* note 43, at 253-66.

²⁶⁸ The impact of the war may be partially measured by the change in Lincoln's position concerning the end of slavery. In his First Inaugural Address, Lincoln endorsed a proposed thirteenth amendment which would have guaranteed the South no federal interference with slavery; by the end of his life, Lincoln was instrumental in assuring passage of the thirteenth amendment abolishing slavery. See R. HOFSTADTER, *supra* note 61, at 132.

states in the first instance. He is wrong in limiting it to discriminatory state legislation, however. Many legislators were concerned about racial discrimination in the law as applied; and many wished to reach discrimination occasioned by state inaction. Berger neglects the point—made by several speakers he quotes—that Congress already anticipated state failures to protect governmental rights. The “full and equal benefit of all laws and proceedings” definition of civil rights, therefore, was open-ended. It was tied to the changeable actuality of protections states would grant their own citizens.

Section 1 of the Civil Rights Act of 1866 enumerated basic economic rights, with the supposition that the states had protected, and would continue to protect, rights to make and enforce contracts, to hold and lease property, and so on. But the 39th Congress could not be sure in what other ways the individual states would recognize rights or would afford redress. For example, public schooling was a new notion in most of the country. The “full and equal benefit” provision was an assurance of equal paternalism and of equivalent redress. Government had a duty *at least* to assure protection of the person and property as enumerated in section 1. But if a state government went further, and secured other civil rights for some of its citizens as it helped them to pursue security and happiness, it had an obligation to grant such rights fully and equally. If a state created a legal right to an education, it could not restrict that right to whites. Everyone, except Indians not taxed, had legal rights equal to those of whites: that is, a right to full and equal benefit of all laws and proceedings for the security of person and property. Government existed to secure rights; once it did so, it had to do so fully and equally, to assure equal opportunity for redress and to guarantee like punishment and no other.

Berger is probably correct in arguing that suffrage was not deemed a civil right in 1866. After all, women were citizens but they did not have the vote. The continued separation of the races in the schools of the District of Columbia and in a few Northern states indicates that a majority of the 39th Congress, if they gave any thought to it at all might not *then* have included a right to integrated schooling in their definition of civil rights. But the members of the 39th Congress did not carefully limit and specify the civil rights with which they were concerned, nor did they indicate that they hoped to set those rights in 1866, as in Devonian amber.

History, constitutional or otherwise, demands more than a brittle literalness. It involves an attempt to capture a pattern, to elucidate a theme. History requires a consciousness of the dilemmas faced and

the compromises effected by fallible human beings. Berger's approach recalls a comment by James Russell Lowell about abolitionist leaders: practitioners of Berger's kind of history "treat ideas as ignorant persons do cherries. They think them unwholesome unless they are swallowed stones and all." ²⁶⁹

To sacerdotalize the Constitution in the face of the unruly reality of the post-Civil War period disservices both history and constitutional law. The Constitution is a vital symbol. Otherwise, "it is a *constitution* we are expounding" ²⁷⁰ would be simply a tautological phrase. As Alfred North Whitehead put it, "those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows." ²⁷¹

That the Constitution itself is in part a symbol does not make it false or inherently falsifiable. But to deny its symbolism altogether—even for the unexceptional men who went about altering the constitutional text after the Civil War—is finally to mistake a rigid jurisprudence for history. Alexander Bickel made a vital point when he advised Justice Frankfurter that "a charitable view of the sloppy draftsmen of the Fourteenth Amendment would ascribe to them the knowledge that it was a *Constitution* they were writing." ²⁷² At times, even the Trumbulls and Bingham of 1866 reached for the heights. Their failure adequately to constitutionalize fundamental rights is a national tragedy. But Berger makes a serious error in trivializing their attempt. His is a very significant historical lapse. It must not go unanswered, for, after all, "history also has its claims." ²⁷³

²⁶⁹ *Id.* at 143.

²⁷⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original). Felix Frankfurter offered rather fulsome praise of the significance of the phrase, calling it "the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending." Frankfurter, *John Marshall and the Judicial Function*, in *GOVERNMENT UNDER LAW* 6, 8 (A. Sutherland ed. 1956). But see *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting) (arguing that when constitutional language is explicit, it should not be extended).

²⁷¹ A.N. WHITEHEAD, *SYMBOLISM, ITS MEANING AND EFFECT* 88 (1927).

²⁷² Letter from Alexander Bickel to Justice Frankfurter (1953), quoted in R. KLUGER, *supra* note 169, at 655.

²⁷³ *Rosenberg v. United States*, 346 U.S. 273, 310 (1953) (Frankfurter, J., dissenting *post hoc*).